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FROM THE DECLARATION  
OF INDEPENDENCE  
TO THE CONSTITUTION



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OF INDEPENDENCE  
TO THE CONSTITUTION

*The Roots of American Constitutionalism*

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# THE ROOTS OF AMERICAN CONSTITUTIONALISM

## I THE BACKGROUND OF POLITICAL THOUGHT

It is a common misunderstanding especially on the part of practical men to think that great historical events such as the Declaration of Independence and the efforts at constitution making which followed it spring from social life and man's nature like Athene from the forehead of Zeus. In point of fact events of this type have a long seed time during which the ideas crystallize which eventually inform the actions taken. This observation does not oblige one to treat ideas as the only or even the major forces in history. Political and economic cultural and religious factors all play their vital part alongside the individual human being who is cast in the role of leader. But none of these other factors can come into play except by being channeled through human thought and this thought is molded by the ideas prevalent among those who are trying to figure out solutions to the concrete and practical problems confronting them.

The seeds which germinated before the American Revolution and burst forth into the great documents here under consideration were gathered over a long period of time. Indeed some of the crucial ones such as that men are created equal trace to the beginnings of Christianity and to the great thinkers of classical antiquity. That a good government should be a government of laws and not of men is a rhetorical exhortation of the Aristotelian (as well as late Platonic) notion that a government should be operating according to law and was so operating whenever it was ethically sound. But it would be manifestly impossible to trace the basic ideas of Western political thought embedded in the American Declaration of Independence and the Constitution throughout the





# *1 The General Idea of Constitutionalism*

The idea of constitutionalism in the distinct Western sense was slowly distilled in the course of English revolutionary developments. Its antecedents reach back to the medieval doctrine of the supremacy of law. But only when this law was understood as something man made and consciously conceived and explicitly formulated to deal with specific issues did it posit the problem of constitutionalism in its characteristic modern form. The traditional English notions are expressed in terms of a legislative power exercised by the King in Parliament. In this form they find their place in the political thought of Sir John Fortescue, Sir Thomas Smith and Sir Edward Coke.<sup>2</sup> All three of them are disinclined to differentiate the legislative function very precisely from the judicial function and this has given rise to acrimonious debate among scholars. Some have held that the idea of parliamentary sovereignty was clearly embraced by Sir Thomas Smith,<sup>3</sup> others have denied that there is any clear differentiation between the judicial and the legislative at all. Neither of these views is right. In point of fact, Smith expounded what Harrington came to call modern prudence—a scheme of constitutional government in which the legislative power considered supreme is entrusted to a corporate entity consisting of the estate of the King and the two further estates of the lords and commons, all of which Smith believed to be present in the great court of parliament which represents all England collectively. The problem of supremacy—or as it is called by Legem Angli (1468-70), Publ. (1471), and D. Rep. (1472-4) esp. Vol. II. (1628-41) esp. Vol. II. Cf. F. W. M. Lind, *Constitutional History of England* (1909), pp. 5-12. Cf. Charles H. McIlwain, *The High Court of Parliament and the Supremacy of the Law* (1910), pp. 1-11. Cf. also H. W. Clegg, *The History of the English Constitution* (1906), pp. xx-ii.



self preservation and happiness. When Jefferson came to pen the famous triad of life liberty and the pursuit of happiness (in lieu of life liberty and property as well as happiness as the Virginia Bill of Rights [June 1 1767] had it) he did not make as much of a change from Locke as is sometimes supposed. In Locke the lines between happiness and property are fluid partly because property does not in his *Second Treatise* have the narrow modern meaning of material possessions or even of a bundle of relations<sup>6</sup> but means instead all that rightfully belongs to a man and hence constitutes the ineluctable source of such happiness as he may achieve. Because of this concern with self preservation man readily enters into society so as to make secure these ends in peaceful association with others who are similarly motivated.

Men being as has been said by nature all free equal and independent no one can be put out of his estate and subjected to the political power of another without his own consent which is done by agreeing with other men to join and unite into a community for their comfortable safe and peaceable living one amongst another in a secure enjoyment of their properties and a greater security against any that a man is not of it. And thus every man by consenting with others to make one body politic under one government puts himself under an obligation to every one of that society to submit to the determination of the majority and to be concluded by it.<sup>7</sup>

This constituent act by which a political society comes into existence and a civil government is formed is crucial for the Lockean scheme of things. It stems from the Puritan faith in a fundamental covenant such as the Pilgrim Fathers executed on the Mayflower. The terms of this compact are strictly in line with the thinking that culminated in Locke a kind of thinking which dominated the revolutionary leaders in Britain until Cromwell despaired of his efforts at bringing

<sup>6</sup> Wal on H milton, "Property" in *Encyclopedia of the History of Ideas*.  
<sup>7</sup> Locke *Two Treatises of Government* edited by Thomas P.  
 P and (The Library of Liberal Arts) New York: The Liberal  
 Arts Press, Inc. 1963. Section 9 pp 34-35.

## THE ROOTS OF AMERICAN CONSTITUTIONALISM

into existence a constitution built around a formally divided legislative. The Agreement of the People (1641) has frequently been hailed as perhaps the first modern constitution. It was a growing conviction among Puritans and other Englishmen that a civil government could be instituted by fiat of the constituent will of the people based upon rational principles of government. If such rational principles could be discovered to be embodied in a traditional system so much the better for all concerned. Locke's triumphant demonstration that this was the case in England had much to do with the vogue of his treatise.

But Locke had laid the foundation for the American enterpriser. We read in the Declaration of Independence that in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and furthermore that it may also become necessary to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and Nature's God entitle them. Such phrases were indeed in echo of Locke's statement of the right of revolution. There are here no examples so frequent in history as those of men withdrawing themselves and their obedience from the jurisdiction they were born under and again he asserted that no man or society of men has a power to deliver up their preservation or consequently the means of it to the absolute will and arbitrary dominion of another and therefore whenever any one shall go about to bring them into such a slavish condition they always have a right to preserve what they have not a power to part with. Therefore they may and themselves of those who invade this fundamental sacred and unalterable law of self preservation.

This self preservation was closely bound up with the right of private property. Property had a very broad meaning as we just showed but it also had the very specific and narrow

<sup>8</sup> *Ibid.* Sec. 115 p. 66.

<sup>10</sup> *Loc. cit.*

<sup>11</sup> *Loc. cit.*

<sup>12</sup> *Ibid.* Sec. 142 p. 75

ining which is associated with it today. To take property without a man's consent was one of the most heinous acts of arbitrary government whether this act was agreed to by a parliament or not was of little consequence when that parliament did not represent those whose property was being taken. Locke is insistent upon this point even though he stresses at the same time the binding obligation springing from the decision of the majority once a man has come to acquiesce in his role as a member of the community.

At this point Harrington's thought supplemented Locke's in providing an armory for the revolutionaries. For whereas Locke in spite of his general recognition of the right of revolution had stayed essentially within the framework of traditional English constitutionalism, Harrington constructed his *Commonwealth of Oceana* (1656) from rational principles as he perceived them without any concern for the traditional pattern. We find in Harrington an analysis of the problem of government that leads him to the well-known statement that a commonwealth consists of the senate proposing the people resolving and the magistracy executing. He interprets this in the classical tradition as a mixed form of government partaking of aristocracy, democracy and monarchy and therefore complete.<sup>1</sup> A commonwealth is for Harrington always a government of laws and not of men. He never wearies of repeating this basic insight which assigns to the wise and intellectually superior the role of discussing the problems to the people as the compound of all the divergent interests the role of making the basic decisions and to the magistrates the task of enforcing and executing these decisions. It is evident that once representation of the people in a popular assembly is added the American scheme of a government based upon the separation of powers is delineated. This government comes into existence by the people's constituent act when they organize the government in accordance with these principles.

<sup>1</sup> James Harrington, *The Commonwealth of Oceana* (ed. T. B. Howell), pp. 4-5.



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James Harrington  
1607 pp 458

*The Commonwealth*

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<sup>8</sup> Ibid. Sec. 11 p. 66  
<sup>9</sup> Ibid. Sec. 119 p. 83  
<sup>10</sup> Loc. cit.  
<sup>11</sup> Loc. cit.

Montesquieu went to England to observe the workings of British government. In any case Montesquieu cherished a preconceived notion in favor of an independent judiciary such as he himself knew in France and which was still operative there though in a very limited way. Locke had not emphasized the judicial power. To him it was rather important to stress the legislative authority of parliament and so he assigned to the crown most of the judicial power under the heading "execution of the laws." Montesquieu was most determined to vindicate the separate status and basic importance of this power of which he wrote the famous description that it is *dans une façon nul* that is to say in a certain sense nothing in the way of a constitutional evolution a step which fitted right into Montesquieu's notions and that was the Act of Settlement by which the judiciary was made independent through the well known conjunction that judges hold their office *qu'amdieu se benege sent* (as long as they conduct themselves well). So Montesquieu would seem to have been justified in modifying the Lockean scheme by a clear recognition of this power as separate and distinct.

Now while the executive power becomes the judicial power the federative power which in Locke's system had been the power of war and peace that is to say over foreign policy is by Montesquieu expanded to become the executive power. This Montesquieu accomplished by associating the problem of internal with that of external security and thus merging the idea of police methods for maintaining internal peace and order with the idea of devoting means for insuring safety from external aggression. This new executive power corresponded of course much more nearly with modern conceptions than Locke and indeed it was derived from and informed by continental European politics and government in the days of benevolent despotism and mercantilism.

Cf. Locke, *op. cit.* Sec. 143, 144, 149, 156.

Cf. *les de* Sec. *ndat* B.

1. *Thomson's* *gent* XI, Cl. VI. *esq* *eu* *Sp* *i* *j* *th* *La* *tra* *i*

## 2 *The Separation of Powers*

Such then was the nature of the concept of constitutionalism which America had evolved from the speculations and practices of the past. A second cornerstone of the edifice of political ideas which America had constructed was the idea of separation of powers and it therefore becomes important to sketch the way in which this doctrine developed prior to its reception by the writers of America's fundamental law.

The idea of the separation of powers emerges from the much older notion of a mixed form of government which goes back to Plato and Aristotle and was elaborated by Polybius. It is fascinating to watch this ancient idea being transformed into the related but different modern concept. The role of the English parliament is vital in this connection as is the emergence of the emphasis upon legislation already noted. For Locke the real concern is not that of separating the powers or functions (which had actually been more clearly divided by Sir Thomas Smith) but of dividing the legislative power because it is so very important. What is of primary importance is to prevent the legislative power from being abused and that can only be done by making king, lords and commons share in its exercise. The other two powers or functions which Locke identifies namely the executive and the federative are not so important hence he is quite content to entrust them to the monarch who also possesses a residual power of the prerogative. This rather primitive scheme of separation of powers was radically revised and rationalized by Montesquieu. Montesquieu has often been taken to task for not perceiving the emergent pattern of British parliamentary government. Such critics overlook that this scheme of things was actually looked upon by many of the contemporaries as a kind of corruption<sup>1</sup> and certainly was not very fully developed let alone stabilized and legitimized when Mon-

<sup>1</sup> Eg. Henry St John, Viscount Bolingbroke *AD 1710-1711*  
*Papers* (1734).

he was his various governmental powers appear to be so completely occupied with checking and balancing each other that little power is left for the primary task of governing. The same passionate faith in the constructive powers of society as against the purely repressive function of government is set forth by Thomas Paine. Society in every state is a blessing he proclaimed in *Common Sense* (1775) but government even in its best state is but a necessary evil in its worst state an intolerable one. The ringing phrases of the pamphlet culminate in a very declaration for independence which stems from a withering attack upon the British constitution. The British constitution is described as a senseless compound of remains of monarchical tyranny remains of aristocratical tyranny and republican materials. It is so exceedingly complex that no one knows what he is at. To say that the Constitution of England is a union of three powers, reciprocally checking each other is farcical either the words have no meaning or they are flat contradictions.

He explores this farce he surveys the recent conflict with Britain and he cries out Everything that is right or reasonable pleads for separation. The blood of the slain the wailing voice of nature cries *It is time to part*.<sup>10</sup> He reinforced this thought later in his *Rights of Man* (1791—first published in French). The continual use of the word *Constitution* in the English Parliament shows there is none if there were a constitution it certainly could be referred to and the debate on any constitutional point would terminate by producing the constitution. Here we have the conceit of many writers and thinkers of the time the result of the lack of semantic sophistication if you write a constitution its meaning will be self-evident. Paine speaks for a widespread movement in England by his *Common Sense* and *Other Political Writings* edited by the Liberal Association (The American Heritage Series, Vol. 3 [New York: The Liberal Association, 1964] p. 4).<sup>11</sup>

<sup>10</sup> *Ibid.* p. 7. <sup>11</sup> *Ibid.* p. 3.

<sup>12</sup> *Rights of Man* Part I Miscellaneous Chapter (cf. Thomas Paine, ed. by Henry Hayden Clark [New York: American Book Company], p. 151).

This distinction of the several functions is in fact rationally based upon the differentiation of the types of decisions which man is called upon to make namely to formulate general rules to adopt specific and particular actions or measures and to adjudicate between conflicting interpretations of general

— their application to particular situations.<sup>4</sup> It deeply affected the American constitution makers who made it an ing premise of the American constitutional pattern. It was cited extensively in the debates as well as in justifications such as *The Federalist* afterwards. This has obscured the fact that Montesquieu almost by a sleight of hand transformed Locke's reasoned argument about the importance of the legislative power (because of its inherent importance) into the contention that liberty required the separation of these several functions from each other and the vesting of them in separate and distinct persons or bodies of persons.

Thus an argument against the concentration of the legislative power in one hand became an argument against concentrating of the three powers in one hand but with the corollary presumption that the legislative power might as well be in the hands of one person or group of persons. The merger of this notion with the older notion of legislative supremacy has led to a construction which has recurrently threatened the United States with the patent evils of Congressional government.<sup>5</sup>

When eventually John Adams came to elaborate the ideas of Montesquieu in terms of a complex pattern of separated and mutually checked and balanced powers it became clear that the fear of government had become so great that the separation of powers was not very nearly the concept of a state of nature.<sup>6</sup> Ardent believer in orderly government that

<sup>4</sup> For further detail see Friedrich Constantius, *Government and Democracy* (1911) Ch. V.

<sup>5</sup> Cf. Thomas Woodrow Wilson, *Congressional Government* (1885).

<sup>6</sup> Cf. John Adams, *A Defence of the Constitution of Government of the United States of America* (1787-8). Cf. also Zoltan H. H. John, *Adams and the Prophets of Progress* (1917) esp. Ch. VIII.

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<sup>7</sup> *Common Sense* (1776) p. 7.

<sup>8</sup> *Rights of Man* (1791) p. 11.

<sup>9</sup> *Common Sense* (1776) p. 11.

<sup>10</sup> *Rights of Man* (1791) p. 11.

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<sup>4</sup> For further details see Friedrich *Constitution and Government* (1914) Democracy (1915) Ch. X.  
<sup>5</sup> Cf. Thomas Woodrow Wilson *Congressional Government* (1885).  
<sup>6</sup> Cf. John Adams, *A Defence of the Constitution of the Government of the United States of America* (1787-88) Cf. also *The Rights of the Americans and the Prophets of Progress* (1907) esp. Ch. VIII.

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land and on the Continent Americans in acting upon it were not doing something out of line with prevailing European thought but distinctly intended to be an expression of it.

The argument which Paine is combating is of course that of Burke. Burke had exalted the British constitution based upon the prescription of long usage. Burke had denounced the proclamation of abstract rights in the name of a presumption in favor of long established privilege.<sup>12</sup> Said Paine:

Every age and generation must be free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of tyrannies.<sup>13</sup>

Government is man created and man will do away with it when it fails to do what it was set up to do. In keeping with Locke's already considered opinion Paine claimed that the instant formal government is abolished society begins to act. A general association takes place and common interest produces common security.<sup>14</sup> Formal government he thought made but a small part of civilized life and the more perfect a civilization is the less occasion has it for government. He cause the more does it regulate its own affairs and govern it self.<sup>15</sup> In these radical pronouncements a clearly an archaic strain appears somehow a free association is pictured as capable of effective action yet at another point he himself acknowledges that government is nothing more than a national association acting on the principles of society.<sup>16</sup>

### 3 The Natural Rights of Man

Now among these principles of society the most important in the eyes of the American revolutionaries no less than in those of Thomas Paine were the natural rights of man and the concept of rights is the third premise of American political thought which we must consider. The Declaration of Inde-

<sup>12</sup> Edmund Burke *Reflections upon the Revolution in France* (1790) pp. 6-7.  
<sup>13</sup> Thomas Paine *Common Sense and Other Political Writings* (1776) pp. 117-118.  
<sup>14</sup> *Ibid.* p. 170.

penance is explicit on the subject and the Constitution was not adopted until the addition of a Bill of Rights was effected. We have already remarked that

seen the preceding century and a half however. From Grouse to Hume natural law had offered itself not only as a principle for justifying revolution as in Locke but as a principle for justifying absolute authority and monarchical government. Indeed by the time the Declaration was composed natural law had become a commonplace of general argumentation and its philosophical foundation had been undermined by Hume. From it Thomas Hobbes had deduced a long list of rules of prudence and the absolutists of a later day had sought to argue from it for some rational restraint to be observed by benevolent rulers.

But the key idea was that of the sacred sphere of human right which no government invades but at its peril. The toleration which John Locke preached was but a concluding sermon in which a century's protracted arguments over religious freedom were summed up just as his spirited defense of the right of private property summarized the notions concerning economic freedom that had developed in the struggle against royal absolutism. It was only natural that once the right of freedom in the sphere of religion and property should have crystallized, others should make their appearance. These rights which were set forth in most of the state constitutions framed after the Declaration of Independence were all ways treated as inherent, that is to say as basically related to man's very being and dignity. Certain procedural safeguards had already figured prominently in the days of Sir Edward Coke had been the center of the Petition of Rights (1688) and continued to be looked upon as a birthright of all Englishmen. Thus the right of an accused to be brought before a judge and to hear what the accusation levelled against him to be confronted with witnesses to have a speedy trial by an impartial jury

and to be free from compulsion to give evidence against him self—in short that a man may not be deprived of his Liberty except by the Law of the Land or the Judgment of his Peers as the ancient formula went—all these rights were now linked with the religious and property rights into one comprehensive package To it were added freedom from searches and seizures and even the freedom of the press and of peaceable assembly among others

The recognition of these basic rights is intimately associated of course with the rise of constitutionalism and its theory Only when the idea of a limited government had firmly taken root could the concept of such rights be fully implemented The very complaints which the Declaration voiced as demonstrating the tyrannical character of the rule of George III are formulated as violations of these rights The most comprehensive philosophy of these rights in terms of natural law is formulated by the philosopher Christian Wolff who in his *Institutions of the Law of Nature and Nations* (1750) noted equality and a right not only of security and self-defense but also of punishing a wrong doer His thought traces clearly back to Locke The trenchant criticism levelled by Hume at the concept of natural law and rights seems little to have affected the writers of the Constitution In John Adams view Hume was a wise fool a learned idiot a profound deep-thinking coxcomb<sup>1</sup> but Hamilton thought him solid and ingenuous (sic)<sup>2</sup>

<sup>1</sup> Harari op cit p 14  
<sup>2</sup> Cf. *The Federalist* No 85 where Hamilton quotes the following passage "To balance a large society with the monarchial & republican on general laws a work of so great difficulty that no human genius is ever comprehensible by the mere intellect in the work reflection to effect it The judgment of many must be the perfect experience must guide the labor we must be the perfect line and the feeling of inconcinnities must correct the mistakes which they inevitably fall into in their first trial and permit them of the Rule and Proverbs of the Art and Sciences printed in *David Hume's Political Essays* (The Library of Liberal Arts No 31 New York The Liberal Arts Press Inc) pp 111ff.

Georg Jellinek has argued persuasively that the preceding natural law doctrines and the ideas of the enlightenment were insufficient for explaining the idea that these rights should be solemnly declared. Stressing the Lockean antecedents is not enough. In such a work as James Otis' *The Rights of the Colonists Asserted and Proved* (1764) these rights are transformed so Jellinek insists into subjective rights. These rights are not conferred by the state but are possessed by the individual against the state. And since England sought to invade them the idea now appears that these rights should be solemnly proclaimed. It was so done at Boston in 1770 and again at Philadelphia in 1774. It is to be doubted, however, whether the distinction between objective and subjective rights is really important. The Petition of Rights in 1628 had stated the four rights which it vindicated as rights of all free Englishmen and had solemnly proclaimed them. But the Declaration in America broadened them from the prescriptive rights of Englishmen into human rights of universal application.

#### 4 Federalism

The Articles of Confederation and the Constitution are both built upon the idea of federalism and it is worth inquiring whether there are significant antecedents for this important doctrine. It is often alleged that federalism constitutes a wholly novel attack upon problems of government, especially as propounded in *The Federalist*. No one would have been more surprised than Madison to hear any such claim made. For he made an extensive review of past federal experience and *The Federalist* shows very clear signs of the Constitution having been written in the light of these experiences and their theoretical formulations.

The theory of federalism is a difficult subject. Gierke has linked it with the Germanic corporate theories of free and

and to be free from compulsion to give evidence against him self—in short that a man may not be deprived of his Liberty except by the Law of the Land or the Judgment of his Peers as the ancient formula went—all these rights were now linked with the religious and property rights into one comprehensive package. To it were added freedom from searches and seizures and even the freedom of the press and of peaceable assembly among others.

The recognition of these liberties right intimately associated of course with the rise of constitutionalism and its theory. Only when the idea of fundamental rights had firmly taken root could the concept of such rights be fully implemented. The very complaint which the British constitution of George III are straining the tyrannical character of the rule of George III are formulated as violations of these rights. The first comprehensive philosophy of the rights in terms of natural law was formulated by the philosopher Christian Wolff (1687-1754) noted *Institutions of the Law of Nature and Nations* (1750) noted equality and rights in terms of natural law. He noted also of punishing a criminal for his crime. He noted back to Locke. The trend toward the rights of the individual in the concept of natural law at this time led to the rights of the writers of the Constitution in John Adams. Hume was a wise fool a learned idiot and a self-deceived thinking coxcomb but Hamilton thought him self an ingenious (sic) ?

1112 1/2 p 14  
 Cf. *The Federalist* No. 10  
 passage To bin large  
 republican on gen 11 was  
 general we comprehend  
 reflect on to effect the  
 experience in good the  
 and the feeling of neon en  
 inevitable fall in the  
 the Rise and Progress of the Arts  
 Hume *Political Essays* (The Library of Theoria)  
 York. The Liberal Arts Press, Inc. pp 1112

Georg Jellinek has argued persuasively that the preceding natural law doctrines and the ideas of the enlightenment were insufficient for explaining the idea that these rights should be solemnly declared. Stressing the Lockean antecedents is not enough. In such a work as James Otis' *The Rights of the Colonies Asserted and Proved* (1764) these rights are transformed so Jellinek insists, into subjective rights. These rights are not conferred by the state but are possessed by the individual against the state. And since England sought to invade them the idea now appears that these rights should be solemnly proclaimed. It was so done at Boston in 1712, and again at Philadelphia in 1744. It is to be doubted however whether the distinction between objective and subjective rights is really important. The Petition of Rights in 1678 had stated the four rights which it vindicated as rights of all free Englishmen and had solemnly proclaimed them. But the Declaration in America broadened them from the prescriptive rights of Englishmen into human rights of universal application.

#### 4 Federalism

The Articles of Confederation and the Constitution are both built upon the idea of federalism and it is worth inquiring whether there are significant antecedents for this important doctrine. It is often alleged that federalism constitutes a wholly novel attack upon problems of government especially as propounded in *The Federalist*. No one would have been more surprised than Madison to hear any such claim made. For he made an extensive review of past federal experience and *The Federalist* shows very clear signs of the Constitution having been written in the light of these experiences and their theoretical formulations.

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Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (Hd ed. 1927) Ch. IV esp pp 66ff.

cooperative is obvious. There can be little doubt that some medieval writers notably the conciliarists adumbrated a kind of federal theory. The notion of a federal structure of political society is made explicit by Johannes Althusius the center of his doctrine of state and sovereignty. He is the commonwealth as an organic structure rising from a federation of families into guilds a federation of guilds into towns of towns into provinces and provinces into a commonwealth. The right of the community built up of federated groups. In contrast to most of the writers of the fifteenth and eighteenth century who conceived of the state as a genuine theory of such state Althusius put it for a genuine Netherlands and Switzerland. As well known the makers of the American constitution understood it in both.

Put there is a hint that Althusius is not the most comprehensive political thinker of the sixteenth century. Calvinism. His work has been neglected by orthodox Calvinists. Instead they had before them the theory of the importance of intermixture of the various nations which he neglected. Althusius had held that the state is not a mere machine as apt to turn into a dictatorship with the state in the hands of a few well but did not tell in the state in the hands of a few. Federalism. Indeed I had such a theory at the time it might have served as it does not exist for the sake of the underlying idea of popular sovereignty which we have examined when combined with the right of revolution and that right spelled independence rather than federal bonds.

The modern theory of federalism arose from the compromise

Otto Gierke (1864-1934) and Ernst Kantorowicz (1892-1962) translated by Fred under the title *The Development of Political Theory* (1937) Ch. V  
 Cf C. J. Friedrich *Political Theory and the American Scene* (1938)  
 esp. the Introduction (1935) Althusius

mises which were worked out in the course of the constitutional labors at Philadelphia. These compromises themselves were not the result of theoretical speculations but of a hard-headed concern with the practical exigencies. What the constitution makers aimed at was a federal union strong enough to provide an effective government and yet limited enough to leave ample scope to the several states for a political life of their own. This of course had been precisely the aim of those who undertook to build up the Swiss Confederation and later the United Provinces of the Netherlands. Hence their practical experience was valuable in fact it embedded the kind of earlier constitutional thinking that had interested Althusius who studied in Switzerland and spent most of his life in the city of Emden which was closely associated with the Netherlands. Indeed his theories were so congenial to the Dutch that they made several efforts to secure his services. So a thread runs to the American constitution from these earlier efforts but it is a thin one.

### 5 *The Problem of Democracy*

If federalism emerged from the constitutional work done at Philadelphia the same cannot be said with equal certainty of democracy. The later development of the United States into the largest and most powerful democracy ever to come into existence has tended to obscure the fact that it was not so at the beginning. Indeed the makers of the Constitution were sharply divided on the issue. Many of them shared the eighteenth-century prejudice against democracy (see below). Notably Hamilton but others as well thought of the people as a rather dubious repository of political power. *The Federalist* is full of such animadversions as the gusts of popular passion and the like. But there were others of course notably Benjamin Franklin who wanted a democratic constitution and did their best to secure it. Democracy had not, until then been a highly regarded form





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have referred to the Agreement of the People<sup>1</sup> before. That in all laws made or to be made every person may be bound alike and that no tenure estate charter degree birth or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected —this equality before the law was one of the native rights stressed there. But the Levellers<sup>2</sup> carried the idea further. The dominant elements more especially Cromwell did not accept such notions. John Milton and other ideologues like Harrington bitterly denounced democratic leanings as destructive of a commonwealth. But quite a few of those who had a penchant in this direction went across to America. In John Lilburne's writings we find much of what was alive in America as democratic principles by the time of the Declaration. In his *The Freeman's Freedom Vindicated* (1646) we find such sharp phrases as this. And unnatural irrational sinful wicked unjust devilish and tyrannical it is for any man whatsoever spiritual or temporal clergyman or layman to appropriate and assume unto himself a power authority or jurisdiction to rule govern or reign over any sort of men in the world without their free consent. This was not a generic consent either of a people composed of the upper classes but the mass of the simple folks portrayed in *Pilgrim's Progress*.<sup>3</sup> Time and time again the Levellers raised their voices for all the common people of England against first the elite of the Presbyterian parliamentarians and then the revolutionary elite of Cromwell and his commonwealth men. The Council of the

An agreement between the Independents and the Levellers 1649  
 out of a common program of principles and to a program of  
 ms of the Revolution (CLP) and Libby edited by A. S. P  
 Woodhouse [Chc] Thersy of Chicago Press 1951) p 441  
 2 A party which rose from the radical and more secular political  
 1647 left of center Mor radical d mor secular i the political  
 the k g th n the Independents the Levellers d oca ed levelling of  
 all ra ks. (CL Woodhouse op cit esp th Introduction)  
 3 B yan Pilgrim's Progress From This World to That Which is to  
 Come





commission & no intermeddles with that which cannot be given him in commission from the people 10

Ideas such as these were expounded by an ever-expanding stream of voices in Colonial America including the non Puritan colonies of the South until by the time Jefferson came to compose the Declaration they had swollen into a mighty chorus. That is why Jefferson could later say that these ideas seemed to be the common sense of the matter.

If one reviews the overall course of American thought as embodied in the Declaration of Independence the Articles of Confederation and the Constitution one is bound to conclude that the ideas are not new. Whether one considers constitutionalism as such or the related notions of a separation of powers rationally based on human rights derived from natural law of federalism and of democracy they are part and parcel of the great heritage of Christian Europe. As Carl Becker has said in his remarkable study of *The Declaration of Independence*

In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century. The philosophy of the Declaration was not taken from the French. It was not even new but good old English doctrine newly formulated to meet a present emergency.<sup>1</sup>

This fact of its linkage with the European heritage is not a weakness but a point of decided strength in the past as well as at the present time and in the future.

## 6 The Pre-revolutionary Controversy

The course of history that culminated in the Declaration of Independence and the Constitution can be traced back as we have seen to its roots in the ancient tradition of the western world but the immediate stimulus for this upsurge of revolution is to be found in the events of the eighteenth century.

<sup>1</sup> *The Bloody Tenent's Year* (1870)

<sup>2</sup> *Carl Becker The Declaration*

*Bloud* (printed in *Annals*)

*Independence* (1947) p. 9



most a century the mother country had pursued toward the colonies a policy that Burke called salutary neglect and America as might have been expected had developed a national character while England was looking the other way. Now the American mind was emerging to take its place on the stage of world history and some knowledge of it is important to an understanding of the institutions it fashioned.

The American spirit as the British ministry might have perceived had it troubled to examine the matter had become something very dissimilar to the England of George III. It was a complex of diverse strains and influences many of them drawn from England in the first instance to be sure but shaped and tempered for the past 150 years in a quite different crucible. It was a spirit rich in strange virtues and—to the Englishman—even stranger prejudices ridden by a multiplicity of contradictions which accounted at once for its attributes and its deficiencies. Like John Adams who became one of the makers of the Revolution and the second President of the United States America was both vain and unsure of herself. Like Benjamin Franklin who skilfully represented the American cause abroad and earned the deep respect of Europe's two most powerful capitals the nascent republic was both homespun and philosophic both pragmatic and speculative. Like John Dickinson who helped foment the revolution with his pamphleteering then opposed the Declaration of Independence and finally enlisted as a private in the revolutionary army the American mind was at one and the same time staunchly traditionalistic and profoundly libertarian. And above all like Thomas Jefferson who was to write the Declaration and to hold nearly every important public office in the gift of his country that country was content to live with her inconsistencies rather than to resolve them.

To understand these characteristics—and most particularly the last—is to understand much about the history of the three decades that followed the Stamp Act and not a little about the subsequent development of the nation. Conceptual patterns that are sound enough when applied to other data break

down when we seek to impose them on the intellectual history of the United States. The familiar story of thesis and anti-thesis struggling toward synthesis is doubly false for America first because the cleavages such a viewpoint postulates so often turn out to be agreements when we examine them closely and secondly because the contradiction that I detect are tolerated and allowed to live side by side in the American mind. It is not quite correct to say that the American spirit was indifferent to its diversities when a contradiction was capable of easy resolution; then America gladly resolved it. But when a synthesis seemed unnecessary or difficult or both there was no doubt as to the force for and to accomplish it in the name of Union. Rather America's principle let the discrepancy of joined together in marriage of opposites that complete intellectual life of the American spirit were the characteristic of the American spirit.

I shall call this truth in the contrast that pre-empted the Declaration of Independence. The limits were plentiful of the time like the Stamp Act and ill-disposed to tolerate the principles of British interference in Amer-ican affairs. Long years of struggle had taught them a knowledge of autonomy and national rights, but a right of self-determination and a right of self-defense had ordered a declaration of independence and a right of self-determination. Many of them felt rightly or wrongly that the political advantages of union with England were not enough to compensate them for an substantial limitation of political and economic freedom. Their instinct told them to resist and even resist the British legislation and the Stamp Act Congress of 1765 resolved that the British tax had a manifest tendency to subvert the rights and liberties of the colonists. The British ministry were willing that they should accept the colonial insistence that Parliament did not have the power to impose such exactions on America if it held the doctrine of parliamentary supremacy. Since this was the very

doctrine which the liberty minded colonists could not accede to the conflict of viewpoints would appear on its face to have been irreconcilable

A more radically logical people might have concluded at once that the only course open was the highway of revolution. But the past of the colonists while teaching them to love liberty had also bequeathed them a solid veneration for the rule of law a veneration all the greater perhaps because the yoke of the law had always rested so lightly on their shoulders. They desired liberty which they felt was their moral due but with almost equal fervor they desired to behave legally. The assertion of parliamentary supremacy loomed as a threat to one or the other of these American ideals it appeared that a choice must be made between them.

Characteristically however America elected to evade that choice and colonial polemicists began to insist that their opposition to British claims was both libertarian and legalistic, that in law as well as in morality Parliament had exceeded its powers. The search for precedent to buttress this argument kept many an American lamp burning for long hours and provides us with an early and excellent example of the creative legalism that was to play such a significant part in the later history of the American nation. The colonists like good lawyers the world over piled their arguments on top of one another on the sound theory that if one did not suffice the next might. They argued that the charters which provided the frames of government for the colonies had been granted to them by the king and that they were subject only to the will of His Majesty Parliament they said had no authority to encroach on the charter rights which the king had bestowed. As Alexander Hamilton put it in 1754

Our charters the express conditions on which our progenitors relinquished their native countries and came to settle in this preclude every claim of ruling and taxing us without our assent.

Moreover said the colonists even if the charters did not



and the mother country that is strikingly similar to the theory of the modern British Commonwealth of Nations. Among others James Wilson one of the most learned of revolutionary statesmen and later a Justice of the United States Supreme Court undertook to show that this position was supported by the traditions of English constitutional law and was able to marshal a fairly impressive array of precedents to document his contention.

Whether these dicta were technically sound whether they would withstand rigorous examination as legal principles—this matters very little in the light of subsequent events. What does matter about these arguments is that the colonists felt compelled to make them and that they were advanced earnestly and repeatedly and never really abandoned. For the colonists these legalistic polemics had the greatest significance because they seemed to provide a link between their traditional and conservative devotion to the rule of law and their instinctive thrust toward liberty. There were men in the colonies who would have been willing to forego legality in order to achieve separation and there were others who would have sacrificed liberty in the name of fealty to the mother country. But the majority of thinking men in America wanted both freedom and legality and they moved toward revolution with the greatest reluctance stopping constantly to reassure themselves that they were not revolutionists after all. They thought of themselves not as mutineers but as sober and reasonable defenders of traditional freedom. If they were bent on a revolutionary course it would be they felt a revolution by due process of law. And characteristically they could see no reason for believing that these objectives were incompatible.

However as relations with England steadily worsened during the 1760's the colonists found it increasingly difficult to maintain a moderate stand. The logic of history swept them inexorably toward the Declaration of Independence. It was hard for these men to reconcile themselves to the necessity for such an act hard for them to relinquish the idea that legal suasion would ultimately win the day. But the intransigence





although the sentiment in favor of outright separation from England was plainly growing this convocation was still ruled by moderate counsels and capped its deliberations by reaffirming the allegiance of the Americans to King George. His Majesty responded by declaring officially that the colonies were in a state of rebellion. In retrospect, it seems hard to believe that Americans could in the face of this royal declaration continue to resist the movement for separation but it required a bomb hell to dislodge them from their position of hesitant moderation. That bombshell was supplied by Thomas Paine who published *Common Sense* in January 1776.

For Paine the problem that had been vexing America was simply solved. Government he said is based on no other justification than the freedom and security of the governed. British rule over America offered the colonists neither freedom nor security but only tyranny and exactions; therefore America should renounce allegiance to the royal brute of Great Britain and should go her own way. It was an unequalled appeal to the principle of self-interest to the principle of popular sovereignty rejecting as fatuous all the sentimentalities that had so far bound America to the crown. And the effect of the pamphlet was electric. Printing presses ran night and day to supply the popular demand; at least 300,000 copies were sold in the next six months; nearly every adult in the colonies had read *Common Sense* or heard it read to him. Everywhere it converted its readers to the cause of independence. It produced almost overnight a wave of anti-monarchical feeling that was not to abate until the question of monarchy had become academic in America. It tore away the fabric of veneration toward the motherland that had existed for more than a century. When the smoke had cleared it was evident that the popular will in America was at last firmly set on a revolutionary course.

Paine undoubtedly kindled the spark that led finally to outright rebellion and separation. His contempt for tradition, his straightforward appeal to the unadorned principle of popular

sovereignty his lack of concern for the legal tortuosities that had preoccupied the colonists had a refreshing and revitalizing effect on the American mind. But this is not to say that the spirit of America was remodeled in the image of Tom Paine. Paine taught the colonists where their interests lay and his fiery prose gave a powerful stimulus to the movement for popular sovereignty. The doctrine of popular consent was henceforward unchallengeable in America. But Americans nevertheless did not interpret that doctrine in strict simplistic terms such as Paine's. Even when they had accepted the need for revolution they clung to their old affection for traditional form and legality. In 1776 when the Declaration of Independence came it took a form that reflected both the libertarian and the traditionalistic elements of the American character. It was an appeal to a candid world pregnant with the philosophic generalities inherited from Hume and Locke explicitly resting on the will of the people. But underneath the radical philosophic surface in alert contrast to the outlines of the familiar legal argument all Americans had not abandoned their insistence that the Declaration was legally defensible. The Declaration itself presented the radical philosophicall detail of the principle that it was tradition to a single model in the popular sovereignty they had merely turned to that tradition ratified the decisions of the people.

## II THE ADOPTION OF THE DOCUMENTS

### 1 The Declaration of Independence

On June 7, 1776 Richard Henry Lee of Virginia acting under instructions from the Virginia Assembly moved to the Continental Congress a resolution for independence. Even at this late stage with commercial intercourse between England

and America interdicted and the clash of arms resounding along the eastern seaboard the only

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... supported by James Wilson and others leading the opposition. On June 10 the debate was recessed for three weeks so that the delegates could return to their states for new instructions. Meantime a committee was designated to draw up a Declaration of Independence so as to have it ready in case the final decision in favor of separation was made. The committee consisted of Benjamin Franklin, John Adams, Roger Sherman, Robert Livingston and Thomas Jefferson, who was made chairman. Its members discussed the general character of the appeal that should be produced and then asked Jefferson to compose it. In two days Jefferson had completed the task. On July 9 the Congress voted to pass Lee's resolution of independence and on July 4 the Declaration itself was issued to a candid world.

The document that issued from Jefferson's felicitous pen was a mirror of the contemporary American spirit. In later years Jefferson himself said that he had simply been trying to place before mankind the common sense of the subject in terms so plain and firm as to command their assent. It was intended to be an expression of the American mind. And that is indeed what it was. Its list of grievances was a recapitulation of the controversies of the preceding decade; its basic premises were a compound of popular political philosophy and concrete American experience.

What were these premises? First there was the concept of natural law as the fundamental basis for the rights asserted in the Declaration. To Jefferson and his like-minded contemporaries there was nothing strange in the assertion that the truths of the Declaration were self-evident. The ancient and essentially ethical tradition of natural law, stemming from Cicero and his predecessors, had merged in American

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On June 7, 1776, Richard Henry Lee of Virginia, acting under instructions from the Virginia Assembly, offered to the Continental Congress a resolution for independence. Even at this late stage with commercial intercourse between England

and America interdicted and the clash of arms resounding along the eastern seaboard the opposition to separation was still substantial. It was specifically for independence.

It developed with John Dickinson supported by James Wilson and others leading the opposition. On June 10 the debate was recessed for three weeks so that the delegates could return to their states for new instructions. Meantime a committee was designated to draw up a Declaration of Independence so as to have it ready in case the final decision in favor of separation was made. The committee consisted of Benjamin Franklin John Adams Robert Livingston and Thomas Jefferson. Robert Livingston was made chairman. Its members discussed the general character of the appeal that should be produced and then asked Jefferson to compose it. In two days Jefferson had completed the task. On July 2 the Congress voted to pass Lee's resolution of independence and on July 4 the Declaration itself was issued to a candid world.

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XXXVIII THE ROOTS OF AMERICAN CONSTITUTIONAL THOUGHT

With this Declaration of Independence, the Declaration of Sentiments, and the Declaration of Sentiments, we have a triad of documents that have shaped the course of American history. The Declaration of Independence is the foundation of our nation, the Declaration of Sentiments is the foundation of our democracy, and the Declaration of Sentiments is the foundation of our civil rights movement. Together, they form the cornerstone of our nation's identity and values.

the recognition of the rights of man and the principle of equality as already rooted in Jefferson's mind. They meant that man was created in the image of God and that all men were created equal and insisting that the time had come when the principles of Christianity by erasing legal privileges based on the color of the skin. Again they were aided in reaching this point by the circumstance that the principle of equality was already rooted in

their experience On the frontier which lay only a few short miles from the doors of even urban Americans artificial distinctions between men tended to dissolve in the common struggle for subsistence

Secondly it is self-evident that men are endowed with the unalienable right to life liberty and the pursuit of happiness Again as with all of this it is only necessary to turn to Locke to find the point of reference Jefferson later said that when he wrote the Declaration he referred to no book not even Locke's *Second Treatise* and this fact is a measure of that book's influence on him and his contemporaries The ideas and even the phrases of Locke had become so deeply imbedded in the thinking of educated Americans of the period that they came to mind unbidden Even Jefferson's use of the pursuit of happiness as the third term in the triumvirate of basic rights instead of Locke's term estate was not, as has been pointed out above necessarily a departure in meaning Stylistically pursuit of happiness is unquestionably better and it may have been no more than an instinct for a graceful phrase that caused the substitution

From here on the philosophy of the Declaration follows the classic eighteenth-century line Since these rights cannot be maintained in practice without social organization men agree by social compact to establish a government to secure them Thus the principle of popular consent is introduced Since this consent based government has no justification beyond the protection of rights it follows that consent must be withdrawn if the government fails to defend the rights of the governed So the right of revolution is reasserted It remains then merely to demonstrate in a catalog of grievances that George III and his government have left basic rights unprotected and have even taken positive action to encroach on them And the argumentative circle is complete the moral warrant for the revolution is indisputably plain

This then was the Declaration of Independence this was the Spirit of '66 At first glance it might seem that it was

<sup>1</sup> See 20 p. xi.





for governing American external affairs but it was impossible to avoid the hard fact that external policy still had to be considered. Accordingly Congress began almost immediately after the Declaration to formulate a plan for conduct of the joint affairs of the colonies. In July 1777 the Articles of Confederation were submitted to the states and within two years all the states except Maryland had ratified. Maryland withheld her approval until March 1781 not because of distaste for the general provisions of the Articles but because her citizens felt that certain western lands claimed by Virginia Pennsylvania Massachusetts New York and Connecticut should be ceded to the nation.

The form of government established by the Articles of Confederation was not very different from the informal arrangement that had developed during the Revolution. Congress was composed of delegates chosen by each state in whatever manner it might choose and each state delegation was entitled to one vote. Although such institutions as a separate executive authority and a bicameral legislature were commonplace in the state governments of the day neither of these characteristic principle of later American constitutional theory was embodied in the Articles. Congress was a single unit and the President provided for in Article IX was merely its presiding officer. Executive power was wielded by various committees at first appointed on an indiscriminate *ad hoc* basis but in 1781 to some extent integrated by the establishment of permanent departments of Foreign Affairs Treasury War and Marine. Congress was endowed with the power to make war and peace to conduct foreign affairs to regulate the Indian tribes to coin money and to establish a post office. A limited judicial function is reflected in the authority of Congress to establish tribunals to deal with interstate disputes and with certain issues of marine law.

The nature of these arrangements suggests that America looked upon the government under the Articles as a sort of diplomatic assembly presiding over a league of otherwise independent states and this description is confirmed by other pro-



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The states for example retained the power to make their own commercial regulations and the nation

give

as

not

taxes in order to obtain funds for carrying on its operations the national government was dependent upon requisitions against the states

But important as were these omissions from the catalog of federal powers under the Articles of Confederation the fatal weakness of the national government was a more general one—that it had no sanctions to enforce the powers that were granted to it or to compel the states to conform to a pattern. This deficiency

in fact they honored the national government's requisitions when they chose to and breached them when they preferred. Nothing could be done to make the states comply if they were reluctant to do so. Actual coercion of the states by the national government was unthinkable even if it had been possible for the average American thought of himself as a Virginian or a New Yorker first and as an American second. And the central government was equally ill armed to enforce confederation laws against citizens mainly because the Articles had failed to provide for a federal judiciary. Adherence to confederation laws was supposed to be enforced by the courts of the states but these tribunals were subject to no overriding appellate authority. This meant that they could follow national laws or ignore them depending on their own preferences.

These faults in the system of government established by the Articles of Confederation were reflected in the history of the period. The debt contracted during the Revolution remained unpaid and this was felt by the many bougeois-minded among the colonists to constitute a continuing reproach to national honor. Great Britain discriminated against American merchant ship and the government of the United States was



and Gerry were won over to the Anti-Federalist party of Jefferson. But for the time being they were commonly devoted to the cause of national union. The Federalists sought a revolution on that which would break the bonds with the mother country. But the revolution they had embraced the principle of republicanism as their moral justification. But the revolution they had envisioned was intended to preserve as well as innovate. It was meant to enshrine not only the will of the people but also the sober virtues of the Anglo-American middle class tradition. And now it seemed they were faced with a peril which as Americans they deeply dreaded—the peril that one principle might become predominant that the nation might be forced to choose between the tradition and the people. They faced or thought they faced a danger which would be known throughout the world a few years later as Jacobinism.

Fortunately for the future of American union the faction in the colonies which was most stirred by these fears consisted of those who by heredity and training were the natural leaders of the new nation. Whether or not the nascent democratic movement contained the seeds of Jacobinism it certainly did constitute a powerful unionist force and the conservative leaders of opinion who had helped make the Revolution not set themselves the task of preventing it from realizing these twin potentials. The democratic spirit whose excesses they dreaded as in fact only half-formulated and ill-supplied with men to plead its cause and the result was that the traditional leaders of the community were able to carry through a successful program for establishing union and mitigating the dangers of unchecked popular rule.

Yet it would be a serious mistake (though it is one frequently made) to interpret the movement for union and the eventual establishment of the National Constitution as a counter-revolution in the profound sense as a Thermidorean reaction. So to regard this development is to misunderstand both the nature of the American community of the 1780s and the character of its leaders. The democratic drive that found expression in stay laws and tender acts was disturbing to



understanding the work of the Convention. The most important compromise from the viewpoint of those who attended the Convention was the agreement as to the method for choosing the House of Representatives and the Senate: the two legislative bodies of the proposed government. The delegation from Virginia had come to the Convention armed with a plan which had probably been drafted by James Madison.<sup>1</sup> This plan was startlingly radical: it ignored the assumption that the delegates were assembled to consider revisions to the Articles of Confederation and boldly set forth an entirely new structure of government that suggested government was frankly nationalistic sharply in contrast to the loose confederation of the past. No doubt the Virginia proposal was a part of the program of the advocates of unionism: a calculated attempt to dislodge the principle of states' rights at the outset and to some extent it accomplished its purpose. Those who might have hesitated to depart from the decentralization of the Articles were comforted when they did so by the reflection that the Virginia Plan would have gone much farther. But the Virginia proposal also raised one of the bitterest issues of the Convention: since it provided that both Houses of Congress be chosen on the basis of population. This would mean that a few large states among them of course Virginia itself would enjoy a commanding voice in the new government and the smaller states objected strenuously. They counted with the New Jersey Plan<sup>2</sup> a much more modest proposal for revising the Articles which would have preserved the autonomy of the states as the basic principle of the new system and for a time the Convention deadlocked on this issue. The final compromise—the Great Compromise—was to give the states equal representation in the Senate while retaining the principle of representation by population in the

Although the plan was officially introduced to the Convention by R. d. lph. Cf. both "The Virginia Plan" as offered by R. d. lph. and "The New Jersey Plan" Reported by the Committee of the Whole. Cf. pp. 30ff.



Congress would not use the commerce power to interfere with the importation of slaves until 1808 (Article I Section 9) and the agreement for choosing the President by electoral vote in the first instance and by individual vote of the states if no candidate receives a majority (Article II Section 1). Since the first of these became of historical interest only in 1808 and since as far as the second is concerned the rise of political parties made it almost academic, neither of these compromises can be regarded as involving issues of very great moment. The conclusion seems inescapable that the controversies of the Convention were comparatively trivial in their main concerns.

When we turn to consider the matters over which controversy did not rage the explanation of this fact becomes apparent. When we enumerate the issues on which there was no need to compromise because there was little or no substantial disagreement the real nature of the constitutional movement becomes plain. The startling fact is that the Convention was in almost solid agreement on the basic presumptions of political science which were to form the cornerstones of the new constitutional structure and their concord on these presumptions was far more significant than their disagreements on the matters that led to the compromises. To begin with the delegates assumed from the first that the form of the government would be republican by which they meant that it would find its great source of power in the people. Some of the delegates as has been suggested wished to see democracy controlled some were inordinately fearful of majority tyranny and distrustful of popular judgments. This was certainly the attitude of Hamilton and Gouverneur Morris two of the ablest and most vocal delegates and it was shared in varying degrees by such members as William Randolph of Virginia and Elbridge Gerry of Massachusetts. All of the states at this time imposed some restrictions on the right of suffrage and most of them required a property qualification for voting. There is no doubt that many of the Convention's delegates would have been pleased to see such restrictions embodied in the Federal Constitution and were deterred mainly



House This meant that the smaller states would retain the power to defend themselves against a possible coalition of their more populous neighbors and the compromise is of course historically important because it saved the Convention but its importance to this analysis is chiefly in that it illustrates the comparative utility of the issues on which the delegates divided. As history is to demonstrate there was no realistic ground for believing that the large states would make common cause against the small the great controversies in American politics have arisen out of sectional and economic rivalries which have grouped both small and large states together on opposing sides. The principle of unequal representation in the Senate a later compromise of great importance since it enabled the South to protest its interest with the more populous north but the idea that the large states as such would condescend to oppress the small is without foundation. It is significant that this matter like most of the Convention's problems was a large legacy from the

major compromise Convention was that about the other how slave should be counted in the question of representation in the House of Representatives for representation. Heavily the South had a population already large enough to pick out a substantial party for purposes of representation but the small states were not purpose of taxation but the small states were not enthusiastic about this restriction. The Convention resolved the highest principle of the Constitution led that clause of Article I that each slave should count as three fifths. The Convention purposes of representation in the House of Representatives slavery became such a factor in the Convention that the compromise appeared as an important feature. It was not widely recognized at the time but it will be said to reflect a vital conflict in contemporary American history. No other compromises are traditionally emphasized in assessing the work of the Convention—the agreement that

ically inclined had found confirmation for their bias in favor of separation of powers in the writings of Montesquieu and in those of their own John Adams and Thomas Jefferson. By 1787 the principle was an axiom beyond serious dispute in America and it would have been quite unthinkable to present a frame of government which did not divide the executive from the legislative and both from the judicial powers.

Nor was there need to compromise on the question as to whether the new Constitution was to be the supreme law of the land. As has been suggested above the most serious defect of the Articles of Confederation had been their failure to provide the central government with a means for enforcing its commands. The result was that the national government was in practice inferior to the member states even as to the purposes of the union. Now the Convention with very little argument took the all important steps of asserting the supremacy of the national government and its laws (Article VI Section 1) and of providing a means—the Federal judiciary—by which that supremacy could be implemented by enforcing the national commands against individuals. It is impossible to exaggerate the significance of this dual innovation. The supremacy clause has been called the linchpin of the Constitution, and it is indeed hard to imagine that a national government could have been established without it. The authority to act directly on individuals in collecting taxes and enforcing laws was a new departure in the practice of federalism. Yet neither of these advances gave rise to serious controversy within the Convention hall.

The basic agreement among the delegates was even more striking when they turned to consider those sections of the Constitution that had most directly to do with property rights and commercial relations. As has already been suggested there was at the time a fairly clear-cut split between the interests of land holding debtors on the one hand and merchant creditors on the other. The former group had been inclined to advocate soft money and a relaxation of creditors' rights. Put no such division of opinion was apparent among the mem-



struggle a sober serious property-conscious well informed even scholarly minority. These men knew what they wanted when they essayed the task of constitution making just as they had known what they wanted when they donned the garb of revolutionaries. They had wanted (remarkable conception!) a moderate revolution whose moral justification could be found both in the will of the people and in the constitutional tradition a revolution which would disturb the status quo only so much as they felt it ought to be disturbed. Reckless of strict logic pragmatic to the core they had incorporated in the revolutionary ideology the most disparate principles secure in the confidence that they could make it out of half a-dozen different worlds.

But the checks and balances certain to become the instrument of majority rule. Yet the very instrument that drew its power from the people laid down restrictions on the popular will a result which might sound to a logician very much like nonsense. So likewise with the power granted to the central government—on the one hand it was desired to strengthen it substantially on the other hand too strong a government was traditionally dreaded in America. The solution was characteristic the government was revitalized by granting it broad powers and at the same time weakened by instituting rivalry between its main branches. The separation of powers principle was carefully calculated to prevent a majority from seizing power and using it without restriction. The enumeration of national powers meant that the government even in the hands of a majority was denied the right to exercise powers not enumerated. Sections nine and ten of Article I were crowded with prohibitions against the national government and the states respectively. And although a formal Bill of Rights was not appended to the original document the addition of this safeguard against unchecked power (whether in the hands of the majority or not) was approved by most of those who had participated in the Convention. Finally the



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most serious question of all at the moment—whether the United States was to be a true nation or a league of sovereign states—was not confronted at all but was set aside for the disposal of history.

The Constitution itself was consistent with either interpretation as interminable constitutional debates of the future were to show. The nation confederation problem had been dealt with like all major political questions in America by embracing both alternatives and trusting to providence that the incompatibility could be permanently ignored. And the men who had fashioned this instrument of government knew that whether the majority of the people seemed at the moment to like the Constitution or not it would work for them because it so faithfully reflected the American political character.

#### 4 *The Ratification*

The events that followed the presentation of the finished document to the states demonstrate the validity of the propositions that have permeated this discussion so far. To begin with in the ratification struggle it became apparent that the people as a whole did not share the Convention's nearly unanimous enthusiasm for a new instrument of government. Indeed it is fairly clear that a majority of the populace was opposed to ratification. On the other hand and in the second place it is equally evident that the people were not opposed to the basic premises of the Constitution's political faith—republicanism. constitutionalism, separation of powers, but were animated chiefly by a somewhat ill-informed suspicion that the new government would encroach on popular liberties. Thirdly the ratification struggle and its successful conclusion demonstrated that the Federalists (those who had spearheaded the movement for a new constitution) still enjoyed a superiority of leadership which enabled them to impose their will on the nation even though the majority disapproved. And finally the rapid development during the post-ratification period of

almost universal veneration for the new organic law suggested that the instrument created in 1787 was however lacking in logical symmetry an appropriate frame of government for a nation more concerned with results than with logic.

The struggle over ratification was intense and even bitter but the most striking thing about it is the comparative impotence of those who opposed the new Constitution. That they were in a majority in most of the states seems plain enough but their preponderance was purely numerical. Both argumentatively and strategically their opponents enjoyed a clear advantage. By far the most powerful anti-federalistic argument was based on the curious fact that the Convention had failed to include a Bill of Rights in the proposed constitution. Considering the American preoccupation with the concept of fundamental rights discussed above and the standard practice of appending Bills of Rights to the state constitutions this omission stands forth as the one great tactical miscalculation of the Convention. Apparently the delegates thought that a detailed list of limitations on the federal government was unnecessary since the powers of the government were already restricted by the principle of delegation (this was the concept, implicit in the Constitution and ultimately made explicit in the Tenth Amendment that the national government could exercise only the powers enumerated in the Constitution while all other powers were reserved to the states). But this argument—wrong in any case as the history of the necessary and proper clause Article I Section 8 Paragraph 18 was to show—was too subtle for most voters and the anti-federalists were able to argue that the omission betrayed an intention to subvert the liberties of the people. Much of the wind was drawn from the sails of this argument however when it was agreed that a Bill of Rights along traditional American lines would be added by the first session of Congress under the new government and in some key states this was made in effect a condition of ratification.

Apart from this issue the polemical weapons in the anti-federalist arsenal were relatively few and ineffective as com-





the Federalists outmaneuvered their opponents time after time. The ratification of the Constitution like its composition was a tribute to the leadership qualities of the class that had plotted America throughout these first stormy years of her national history.

Ratification having been achieved by the narrowest of margins and against the preferences of what seems to have been a majority in the nation its aftermath is all the more remarkable. Not all the wounds opened by the ratification struggle were easily healed and this was especially true of the central issue the problem of states rights. The idea of decentralization had been espoused by a faction calling themselves Anti-Federalists and it chanced that this group was also in general composed of men who were more sympathetic to popular government than were many of the Federalists. States rights thus became identified in the popular mind with the democratic spirit and the alliance created vast difficulties in the years to come since the cause of state sovereignty was able to draw support from the cause of democracy. The Anti-Federalists hard up for leaders in the ratification controversy soon found them in men like Thomas Jefferson James Madison George Clinton of New York and Albert Gallatin of Pennsylvania. As the group around Hamilton demonstrated their predilection in favor of the mercantile interests of the Eastern seaboard this Jeffersonian faction claimed the allegiance of the landed interests of the South and West so that states rights populism and agrarianism were forged into a powerful alliance. This triple entente was not only the basis for Jefferson's party (now renamed Republican). It was also the basis of an alignment in American political doctrine that persisted with more or less vitality until the Civil War and in fact still revives from time to time in the modern era. Thus the ratification controversy can be said to have set the patterns of American political factionalism for many years to come. But the Constitution itself the supposed object of contention was warmly embraced. In a few years almost in months the vestiges of opposition to the new Constitution



assumpt on that it is possible to ride both horns of most dilemmas. In a world of deep and irresolvable conflicts legalism can have only a limited place since the questions that divide society transcend the issue of legality. But in a nation which is convinced that inconsistency is tolerable legalism becomes king. The *ad hoc* contingent process of judicial exclusion and inclusion is appropriate to cope with a society which has refused to decide that a single principle of politics shall be its central guide and has preferred to embrace several principles indiscriminately.

### III THE DOCUMENTS AS EXPRESSIONS OF POLITICAL IDEAS

The American Commonwealth has come a long way since the days when the thirteen former Colonies gave themselves the Constitution after adopting the Declaration of Independence. In writing its provisions the framers were not at all sure how long it would last. At the end of *The Federalist* David Hume is cited as authority for the risks involved in constitution making.

To balance a large state or society on general laws (meaning a constitution) is a work of so great difficulty that no human genius however comprehensive is able by the mere dint of reason and reflection to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection; and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments.<sup>1</sup>

If anyone had shown them a vision of the United States in the twentieth century they would have been surprised and

<sup>1</sup> *Political Principles of the Federalist*, No. 25 (New York: Putnam, 1888) p. 31.



stable and there have been times when it seemed that the contrast in their aims made them basically incompatible.

So it appeared for example to the old line proponents of states rights in the early years of the nineteenth century when the Supreme Court under the Chief Justiceship of the great John Marshall bent itself to the task of welding the young republic into a true nation. Marshall asserted and maintained the supremacy of the national court over the courts of the states when federal questions were involved. He upheld such national legislation as the act incorporating the Bank of the United States in spite of the charge that Congress had here exceeded its constitutional powers and he struck down state laws which threatened to fragmentize the national structure. To advocates of states rights like John Randolph of Roanoke and John Taylor of Caroline these *dicta* represented a darkly ominous threat to liberty and Randolph was moved to say

if with the most approved spring lancets you draw the last drop of blood from our veins if *seci n lum artem* you drain the last shilling from our pockets what are the checks of the Constitution to us? A fig for the Constitution. When the scorpion's sting is probing us to the quick shall we stop to chop logic?

Nevertheless the views of the Chief Justice prevailed the cause of national union was greatly fortified by Marshall's forthright pronouncements. And as time wore on more and more Americans began to feel that the choice Randolph and Taylor had propounded between liberty and union was a false one and that the proper course for the United States was that suggested by a famous peroration of Daniel Webster Liberty and Union now and forever one and inseparable! In short, it was felt at least in the North that the old equilibrium of freedom with state autonomy was a false one and that

<sup>1</sup> Henry Adams *John Marshall* ed. J. B. T. Morse, Jr. (Boston: Houghton Mifflin & Co. 1896) p. 229.

<sup>2</sup> *Speeches of Daniel Webster* ed. J. B. T. Morse, Jr. (Boston: A. J. George (Boston) D. C. Heath & Co. 1911) p. 31.



ers Out of this welter of idealism and casuistry only one fact really emerged clearly that the American Constitution was face to face with its severest test. For once the traditional American faith that conflicts would resolve themselves within the structure of constitutionalism was proved groundless, and it took the bitter and bloody Civil War to establish beyond further argument that chattel slavery would go and the union would survive.

The Northern victory made it clear as the Constitution had not, that the American nation was in the phrase of Chief Justice Chase an indestructible union of indestructible states. But the triumph of the North was also the triumph of industrialism and the problem of conflict between the Declaration and the Constitution soon presented itself in a new guise. In the hands of a business-minded Supreme Court, the Constitution was converted in the later years of the nineteenth century into a charter of economic rights for corporate enterprise and with the help of the due process clause of the Fourteenth and Fifth Amendments and the commerce clause of Article I the federal judges frustrated reformist efforts to clear the way for pursuit of happiness which the Declaration had promised. Meanwhile the protection of Negro rights which the North had attempted to insure through the passage of the Thirteenth, Fourteenth and Fifteenth Amendments was minimized by judicial decision.

But in the 1930's the course of constitutional interpretation underwent still another change. The Fourteenth Amendment ceased being used by the Court to stifle economic experimentation and became instead a guarantee of individual freedoms such as speech, press, and a fair trial against action by the state and the commerce clause became as it had been for Marshall a grant of power to the national government rather than a limitation. With these developments it might be said that the Declaration and the Constitution moved closer together than they had ever been before. The inevitable gap between ideal and working system still existed to underline the fact that the source of a model political order is to be





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in the field of federalism, of judicial review and other items, especially in the field of human rights. Finally and still more recently the drafters of a constitution for a European Community have utilized extensively the experience of the United States as a measuring rod by which to test their own plans and proposals.

The demonstrative and educational value of the Declaration of Independence and of the Constitution results however from an indirect influence upon constitutional developments which were local and autonomous. But there is a wider arena in which the constitutional tradition of the United States has achieved world significance. When President Wilson set forth the plan for a League of Nations—a plan which was nurtured by a group of private organizations deeply imbued with this tradition—he actually projected onto the world plane the thinking which had been embodied in America's constitutional documents. The fact that the League failed has dimmed the vision which animated its builders. Characteristically its constitution was called a covenant. It was in the tradition of republicanism and constitutionalism as cherished at the time of the American revolution. This is not the place to explore the reasons for its failure. The establishment of the United Nations proved this failure to be a temporary one anyhow. For the United Nations is another and perhaps a more vigorous sprout from the same root. It too is in line with the basic concept of constitutionalism. Its Declaration of Universal Human Rights while at present neither enforced nor enforceable clearly demonstrates the forward march of the inherent ideas. Nor should we be unduly concerned about the temporary unenforceability. The United States has been at work appoximately enforced. The United States has been at work for over a century and a half trying to make its bill of rights a great reality. But the ideal is far from being a reality.

Precisely because there culminate in these great American documents trends which the accumulated dross of European government and privileged status would not allow to come to



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# THE DECLARATION OF INDEPENDENCE

[July 4 1776]

*The unanimous Declaration of the thirteen united States of America*

WHEN IN THE COURSE OF HUMAN EVENTS it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident that all men are created equal that they are endowed by their Creator with certain unalienable Rights that among these are Life Liberty and the pursuit of Happiness That to secure these rights Governments are instituted among Men deriving their just powers from the consent of the governed That whenever any Form of Government becomes destructive of these ends it is the Right of the People to alter or to abolish it and to institute new Government laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness Prudence in deed will dictate that Governments long established should not be changed for light and transient causes and accordingly all experience hath shewn that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed But when a long train of abuses and usurpations pursuing invariably the same Object evinces a design to reduce them under absolute Despotism it is their right, it is their duty to throw off such Government and to provide new Guards for their future security—Such has been the patient sufferance of these Colonies



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tenure of their offices and the amount and payment of their salaries

He has erected a multitude of New Offices and sent hither swarms of Officers to harass our People and eat out their substance

He has kept among us in times of peace Standing Armies without the Consent of our legislature

He has affected to render the Military independent of and superior to the Civil Power

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws giving his Assent to their acts of pretended legislation

For quartering large bodies of armed troops among us  
For protecting them by a mock Trial from Punishment for any Murders which they should commit on the Inhabitants of these States

For cutting off our Trade with all parts of the world  
For imposing taxes on us without our Consent

For depriving us in many cases of the benefits of Trial by Jury  
For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province establishing therein an Arbitrary government and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies

For taking away our Charters abolishing our most valuable Laws and altering fundamentally the Forms of our Governments

For suspending our own Legislature and declaring them selves invested with Power to legislate for us in all cases whatsoever

He has abdicated Government here by declaring us out of his Protection and waging War against us

He has plundered our seas ravaged our Coasts burnt our towns and destroyed the lives of our people.



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# THE DECLARATION OF INDEPENDENCE

7

dependent States that they are Absolved from all Allegiance to the British Crown and that all political connection between them and the State of Great Britain is and ought to be totally dissolved and that as Free and Independent States they have full Power to levy War conclude Peace contract Alliances establish Commerce and to do all other Acts and Things which Independent States may of right do And for the support of this Declaration with a firm reliance on the Protection of Divine Providence we mutually pledge to each other our Lives our Fortunes and our sacred Honor

JOHN HANCOCK.

*New Hampshire*

JOSIAH BARTLETT  
WM WHIPPLE

MATTHEW THORNTON

*Massachusetts Bay*

SAML ADAMS  
JOHN ADAMS

ELBRIDGE GERRY  
ROBT TREAT PAINE

*Rhode Island*

STEP HOPKINS

WILLIAM ELLERY

*Connecticut*

ROGER SHERMAN  
SAMUEL HUNTINGTON

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WM FLOYD  
PHIL LIVINGSTON

FRANS LEWIS  
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# ARTICLES OF CONFEDERATION

[November 15 1777]

*To all to whom these Presents shall come we the undersigned  
Delegates of the States affixed to our Names send greeting*

WHEREAS THE DELEGATES of the United States of America in Congress assembled did on the fifteenth day of November in the year of our Lord One Thousand Seven Hundred and Seventy-seven and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire Massachusetts bay Rhodeisland and Providence Plantations Connecticut New York New Jersey Pennsylvania Delaware Virginia North-Carolina South-Carolina and Georgia in the Words following viz

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEWHAMPSHIRE MASSACHUSETTS-BAY RHODEISLAND AND PROVIDENCE PLANTATIONS CONNECTICUT NEW YORK NEW JERSEY PENNSYLVANIA DELAWARE MARYLAND VIRGINIA NORTH CAROLINA SOUTH CAROLINA AND GEORGIA

ARTICLE I The stile of this confederacy shall be 'The United States of America.

ARTICLE II Each State retains its sovereignty freedom and independence and every power jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled.

ARTICLE III The said States hereby severally enter into a firm league of friendship with each other for their common defence the security of their liberties and their mutual and general welfare binding themselves to assist each other against all force offered to or attacks made upon them or

## THE BASIC DOCUMENTS

## Pennsylvania

ROBT MORRIS  
BENJAMIN RUSH  
BENJA FRANKLIN  
JOHN MORTON  
GEO CLYMER

JAS SMITH  
GEO TAYLOR  
JAMES WILSON  
GEO ROSS

## Delaware

THO M KEAN

CESAR RODNEY  
GEO READ

## Maryland

THOS STONE  
CHARLES CARROLL of Car  
rollton

SAMUEL CHASE  
WM PAGA

## Virginia

THOS NELSON jr  
FRANCIS LIGHTFOOT LEE  
CARTER BRAXTON

GEORGE WYTHE  
RICHARD HENRY LEE  
TH JEFFERSON  
BENJA HARRISON

## North Carolina

JOHN PENN

WM HOOPER  
JOSEPH HEWES

## South Carolina

ARTHUR MIDDLETON  
THOMAS LYNCH junr

EDWARD RUTLEDGE  
THOS HEYWARD junr

## Georgia

GEO WALTON

BUTTON GWINNETT  
LYMAN HALL

capable of being a delegate for more than three years in any term of six years nor shall any person being a delegate be capable of holding any office under the United States for which he or another for his benefit receives any salary fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States and while they act as members of the committee of the States

In determining questions in the United States in Congress assembled each State shall have one vote

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of the going to and from and attendance on Congress except for treason felony or breach of the peace

ARTICLE VI No State without the consent of the United States in Congress assembled shall send any embassy to or receive any embassy from or enter into any conference agree ment alliance or treaty with any king prince or state nor shall any person hold ng any office of profit or trust under the United States or any of them accept of any present emolu ment office or title of any kind whatever from any king prince or foreign state nor shall the United States in Congress assembled or any of them grant any title of nobility

No two or more State shall enter into any treaty confederation or alliance whatever between them without the consent of the United States in Congress assembled specifying accurately the purposes for which the same is to be entered into and how long it shall continue

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king prince or state in pursuance of any treaties already proposed by Congress to the courts of France and Spain

No vessels of war shall be kept up in time of peace by any



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No vessels of war shall be kept up in time of peace by any

any of them on account of religion sovereignty trade or any other pretence whatever

ARTICLE IV The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union the free inhabitants of each of these States paupers vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce subject to the same duties impositions and restrictions as the inhabitants thereof respectively provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant provided also that no imposition duties or restriction shall be laid by any State on the property of the United States or either of them

If any Person guilty of or charged with treason felony or other high misdemeanor in any State shall flee from justice and be found in any of the United States he shall upon demand of the Governor or Executive power of the State from which he fled be delivered up and removed to the State having jurisdiction of his offence

Full faith and credit shall be given in each of these States to the records acts and judicial proceedings of the courts and magistrates of every other State

ARTICLE V For the more convenient management of the general interest of the United States delegates shall be annually appointed in such manner as the legislature of each State shall direct to meet in Congress on the first Monday in November in every year with a power reserved to each State to recall its delegates or any of them at any time within the year and to send others in their stead for the remainder of the year

No State shall be represented in Congress by less than two nor by more than seven members and no person shall be

that shall be incurred for the common defence or general welfare and allowed by the United States in Congress assembled shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled

ARTICLE IX The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases what captures on land or water shall be legal and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of pirates and felons committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures provided that no member of Congress shall be appointed a judge of any of the said courts

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary jurisdiction or any other cause what



## THE BASIC DOCUMENTS

State except such number only as shall be deemed necessary by the United States in Congress assembled for the defence of such State or its trade nor shall any body of forces be kept up by any State in time of peace except such number only as in the judgment of the United State in Congress assembled shall be deemed requisite to garrison the forts necessary for the defence of such State but every State shall always keep up a well regulated and disciplined militia sufficiently armed and accoutred and shall provide and constantly have ready for use in public stores a due number of field pieces and tents and a proper quantity of arms ammunition and camp equipage

No State shall engage in any war without the consent of the United States in Congress assembled unless such State be actually invaded by enemies or shall have received certain advice of a resolution being formed to invade such State or shall admit of a delay till the United State in Congress assembled can be consulted nor shall any State grant commissions to any ships or vessels of war nor letters of marque or reprisal except it be after a declaration of war by the United States in Congress assembled and then only against the kingdom or state and the subject thereof against which war has been so declared and unless such regulations shall be established by the United State in Congress assembled unless such State be infested by pirates in which case declarations of war may be fitted out for that occasion and kept so long as the danger shall continue or until the United States in Congress assembled shall determine otherwise

ARTICLE VII When land forces are required by any State for the common defence all officers thereof and the rank of colonel shall be appointed by the Legislature of each State respectively by whom such forces shall be raised or in such manner as such State shall direct and all appointments shall be filled up by the State which first made the appointment.

ARTICLE VIII All charges of war and all other expenses

that shall be incurred for the common defence or general welfare and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

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The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary jurisdiction or any other cause what



Judges of the supreme or superior court of the State where the cause shall be tried well and truly to hear and determine the matter in question according to the best of his judgment without favour affection or hope of reward provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States whose jurisdiction as they may respect such lands and the States which passed such grants are adjusted the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction shall on the petition of either party to the Congress of the United States be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another throughout all the United States and exacting such postage on the papers passing thro the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces in the service of the United States excepting regimental officers—appointing all the officers of the naval forces and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces and directing the operations

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress to be denominated a Committee of the States and to consist



time of peace nor enter into any treaties or alliances nor coin money nor regulate the value thereof nor ascertain the sums and expenses necessary for the defence and welfare of the United States or any of them nor emit bills nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased or the number of land or sea forces to be raised nor appoint a commander in chief of the army or navy unless nine States assent to the same nor shall a question on any other point except for adjourning from day to day be determined unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year and to any place within the United States so that no period of adjournment be for a longer duration than the space of six months and shall publish the journal of their proceedings monthly except such parts thereof relating to treaties alliances or military operations as in their judgment require secrecy and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate and the delegates of a State or any of them at his or their request shall be furnished with a transcript of the said journal except such parts as are above excepted to lay before the Legislatures of the several States

ARTICLE X The committee of the States or any nine of them shall be authorized to execute in the recess of Congress such of the powers of Congress as the United States in Congress assembled by the consent of nine States shall from time to time think expedient to vest them with provided that no power be delegated to the said committee for the exercise of which by the articles of confederation the voice of nine States in the Congress of the United States assembled is requisite

ARTICLE XI Canada acceding to this confederation and joining in the measures of the United States shall be ad-



time of peace nor enter into any treaties or alliances nor coin money nor regulate the value thereof nor ascertain the sums and expenses necessary for the defence and welfare of the United States or any of them nor emit bills nor borrow money on the credit of the United States nor appropriate money nor agree upon the number of vessels of war to be built or purchased or the number of land or sea forces to be raised nor appoint a commander in chief of the army or navy unless nine States assent to the same nor shall a question on any other point except for adjourning from day to day be determined unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year and to any place within the United States so that no period of adjournment be for a longer duration than the space of six months and shall publish the journal of their proceedings monthly except such parts thereof relating to treaties alliances or military operations as in their judgment require secrecy and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate and the delegates of a State or any of them at his or their request shall be furnished with a transcript of the said journal except such parts as are above excepted to lay before the Legislatures of the several States

ARTICLE X The committee of the States or any nine of them shall be authorized to execute in the recess of Congress such of the powers of Congress as the United States in Congress assembled by the consent of nine States shall from time to time think expedient to vest them with provided that no power be delegated to the said committee for the exercise of which by the articles of confederation the voice of nine States in the Congress of the United States assembled is requisite

ARTICLE XI Canada acceding to this confederation and joining in the measures of the United States shall be ad





In witness whereof we have hereunto set our hands in Congress Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight and in the third year of the independence of America.

*On the part & behalf of the State of New Hampshire*  
 JOSIAH BARTLETT

JOHN WENTWORTH Junr  
 August 8th 1788

*On the part and behalf of the State of Massachusetts Bay*  
 JOHN HANCOCK

SAMUEL ADAMS  
 ELBRIDGE GERRY

FRANCIS DANA  
 JAMES LOVELL  
 SAMUEL HOLTEN

*On the part and behalf of the State of Rhode Island and Providence Plantations*

WILLIAM ELLERY  
 HENRY MARCHANT

JOHN COLLINS

*On the part and behalf of the State of Connecticut*  
 ROGER SHERMAN  
 SAMUEL HUNTINGTON  
 OLIVER WOLCOTT

TITUS HOSMER  
 ANDREW ADAMS

*On the part and behalf of the State of New York*  
 JAS DUANE  
 FRA. LEWIS

GOUV MORRIS  
 WM DUER

*On the part and in behalf of the State of New Jersey*  
 JNO WITHERSPOON  
 Novr 6 1788

NATHL SCUDDER

*On the part and behalf of the State of Pennsylvania*  
 ROBT MORRIS  
 DANIEL ROBERDEAU  
 JNO BAYARD SMITH

WILLIAM CLINGAN  
 JOSEPH REED 2d July  
 1788



# ARTICLES OF CONFEDERATION

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 pendence of America.

*On the part & behalf of the State of New Hampshire*  
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 GOUV MORRIS  
 WM DIER

*On the part and in behalf of the State of New Jersey*  
 JNO WITHERSPOON  
 NATHL SCUDDER  
 Novr 26 1778

*On the part and behalf of the State of Pennsylvania*  
 ROBT MORRIS  
 DANIEL ROBERDEAU  
 JNO BAYARD SMITH  
 WILLIAM CLINGAN  
 JOSEPH REED 22d July  
 1/78



THE BASIC DOCUMENTS

II

THE CONSTITUTION IN THE MAKING



## RESOLUTION OF CONGRESS

[February 1 1787]

**W**HEREAS THERE IS PROVISION in the Articles of Confederation & perpetual Union for making alterations therein by the Assent of a Congress of the United States and of the legislatures of the several States And whereas experience hath evinced that there are defects in the present Confederation as a means to remedy which several of the States and particularly the State of New York by express instruction to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such Convention appearing to be the most probable means of establishing in these states a firm national government

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union





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[February 1 1787]

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cularly belonging to the functions of the second branch during the term of service and for the space of \_\_\_\_\_ after the expiration thereof

6 RESOLVED That each branch ought to possess the right of originating Acts that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual Legislation to negative all Laws passed by the several States contravening in the opinion of the National Legislature the articles of Union and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the articles thereof

7 RESOLVED That a national executive be instituted to be chosen by the National Legislature for the term of \_\_\_\_\_ years to receive punctually at stated times a fixed compensation for the services rendered in which no increase or diminution shall be made so as to affect the Magistracy existing at the time of increase or diminution and to be ineligible a second time and that besides a general authority to execute the National laws it ought to enjoy the Executive rights vested in Congress by the Confederation

8 RESOLVED That the executive and a convenient number of the National Judiciary ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate and every act of a particular Legislature before a Negative thereon shall be final and that the dissent of the said Council shall amount to a rejection unless the act of the National Legislature be again passed or that of a particular Legislature be again negatived by \_\_\_\_\_

9 RESOLVED That a national judiciary be established to consist of one or more supreme tribunals and of inferior tribunals to be chosen by the National Legislature to hold their offices during good behaviour and to receive punctually at stated times fixed compensations for their services in which no in



THE VIRGINIA PLAN AS REPORTED BY  
THE COMMITTEE OF THE WHOLE<sup>1</sup>  
[June 13, 1862]

[June 13 1891]

1. RESOLVED That it is the opinion of this Committee that a national government ought to be established consisting of a Supreme Legislative Judiciary and Executive
- RESOLVED That the National Legislature ought to consist of Two Branches
- 3 RESOLVED That the Members of the National Legislature ought to be chosen by the People

3 RESOLVED That the Members of the first branch of the national Legislature ought to be elected by the People of the several States for the term of Three years to receive fixed stipends by which they may be compensated for the devotion of their time to public service to be paid out of the National Treasury to be ineligible to any Office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service and under the national government for the space of one year after its expiration

4 RESOLVED That the Members of the second branch of the national Legislature ought to be elected by the People of the several States for the term of Six years to receive fixed stipends by which they may be compensated for the devotion of their time to public service to be paid out of the National Treasury to be ineligible to any Office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term of service and under the national government for the space of one year after its expiration

4 RESOLVED That the Members of the second Branch of the national Legislature ought to be chosen by the individual Legislatures to be of the age of thirty years at least to hold their offices for a term sufficient to ensure their independency namely seven years to receive fixed stipends by which they may be compensated for the devotion of their time to public service to be paid out of the National Treasury to be ineligible to any Office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term of service and under the national government for the space of one Year after its expiration

5 RESOLVED That each branch ought to originate acts

5 RESOLVED That each branch ought to possess the right of originating acts

1 Th t xt f li F rrand R ds f th F deral C m t J  
2283 as rra ged by Carl v Do en n h Th G t R h sal  
(1914) used by permiss f th p bl here, The v k g P ca.  
27



to hold their offices during good behaviour to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution

12. RESOLVED That the national Legislature be empowered to appoint inferior Tribunals

13. RESOLVED That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue impeachments of any National officers and questions which involve the national peace and harmony

14. RESOLVED That provision ought to be made for the admission of States lat fully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise with the consent of a number of voices in the National legislature less than the whole

15. RESOLVED That provision ought to be made for the continuance of Congress and the authorities until a given day after the reform of the articles of Union shall be adopted and for the completion of all their engagements

16. RESOLVED That a republican Constitution and its existing laws ought to be guaranteed to each State by the United States

17. RESOLVED That provision ought to be made for the amendment of the articles of Union whensoever it shall seem necessary

18. RESOLVED That the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union

19. RESOLVED That the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an assembly or assemblies of representatives recommended by the several Legislatures to be submitted to an assembly or assemblies of representatives recommended by the several Legislatures to be expressly chosen by the People to consider and decide thereon





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authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age sex and condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description except Indians not paying taxes that if such requisitions be not complied with in the time specified therein to direct the collection the eof in the non-complying States and for that purpose to devise and pass acts directing and authorizing the same provided that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least        States and in that proportion if the number of confederated States should hereafter be increased or diminished.

4 RESOLVED That the United States in Congress be authorized to elect a federal Executive to consist of        persons to continue in office for the term of        years to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution to be paid out of the federal treasury to be incapable of holding any other office or appointment during their term of service and for        years thereafter to be ineligible a second time and removable by Congress on application by a majority of the Executives of the several States That the executive besides their general authority to execute the federal affairs ought to appoint all military operations provided for and to direct all military operations provided that none of the persons composing the federal executive shall on any occasion take command of any troops so as personally to conduct any military enterprise as General or in any other capacity

5 RESOLVED That a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive and to hold their offices during good behaviour to receive punctually at stated times a fixed compensation for their services in which no increase or diminution



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THE BASIC DOCUMENTS

III

THE CONSTITUTION





## A BRIEF SUMMARY

Although most of the principal provisions of the Constitution have been touched on in the introductory essay it may be useful at this point to set down a brief systematic analysis of the document to serve the purposes of both summary and clarification

### I GENERAL PRINCIPLES OF THE CONSTITUTION

1 *The nature of the Union* The American nation has been identified in a phrase quoted elsewhere in these pages as an indestructible Union composed of indestructible States<sup>1</sup> and this perpetual character of the constitutional arrangement has been recognized both in law and fact since the Civil War and in theory long before that. The textual warrants for this description are comparatively meagre for one it has been argued that the Articles of Confederation were declared to be perpetual and that the Preamble to the Constitution declares that the object is to form a more perfect Union hence the perpetuity of the present Union is inevitably implied. For another thing it can be argued that although the Constitution provides a method by which states are admitted to the Union (see Article IV Section 3) it sets up no machinery for secession from it and recognizes no such possibility unless the amending clause be so regarded (Article V). Presumably the power of amendment might ratify a states choice to leave the Union (although a theoretical dissent even to this might be made) but otherwise the constitutional text is said to imply an indissoluble arrangement. In any case the words of the Constitution aside the Civil War settled the question of indestructibility on a different basis and surely nothing except war or the amendment power can alter that status. As for the amending power itself although it might be regarded as theoretically limited

<sup>1</sup> Texas Wh. Wall 00 (1869)



of state trade regulations are forbidden because they invade the dormant commerce power of Congress and that the states may not directly tax an instrumentality of the federal government (a prohibition which has also been applied in reverse so as to restrict the national government in taxing the states). Neither of these legal concepts is expressed in any specific clause of the Constitution they are said to arise from the nature of the federal system itself.

4 *Intra state Relations* The provisions in Article IV Sections 1 and 2 relating to this subject are survivals of the interstate compact provisions of the Articles of Confederation. Other provisions are the interstate compact clause of Article I Section 10 Paragraph 3 whose possibilities as a source of interstate cooperation are only recently being realized and the arrangement in Article III Section which gives the federal judiciary jurisdiction over interstate disputes. Finally the commerce clause has been held to prevent the states from erecting commercial barriers against their neighbors so as to favor their own citizens at the expense of the rest of the nation.

5 *Elections* The power to prescribe voting qualifications was left in the original Constitution to the several states though with some qualifications and subsequent amendments have extended these qualifications much further. Article I Section provides that those who vote for Representative must have the qualifications of those who vote for the most numerous branch of the state legislature and the Seventeenth Amendment prescribes the same qualifications for those who elect Senators. The states are also forbidden to deny the suffrage on the grounds of race or color (Amendment Fifteen) and on the ground of sex (Amendment Nineteen). The right to cast a vote for federal officers in accordance with valid state regulations can be protected by Congressional legislation. As for election to the presidency the states are left free to prescribe qualifications to vote for the Electoral College (subject of course to Amendments Fifteen and Nineteen) and it was originally assumed that the Electors so chosen would make a free choice. But in practice the Electors

## THE BASIC DOCUMENTS

in some respects the only recognized legal limitation is the denial in Article V of the power to alter the principle of equal representation in the Senate.

2 *The Separation of Powers* The Constitution makes no specific reference to this principle but it has always been assumed that the idea is implied by the opening sentences in Articles I, II, and III, i.e. All legislative powers herein granted shall be vested in a Congress etc. The use of the terms legislative, executive, and judicial respectively imports a division of governmental power between the three departments. The courts have however been lenient in permitting Congress to delegate its legislative power to the executive and the line of distinction between the legislative and executive function is now somewhat blurred. Nevertheless an attempt by the President to legislate without Congressional authorization or a direct attempt by the Congress to assume an executive power could still be invalidated on the basis of this principle.

3 *The Nation and the States* The principal clauses of the Constitution relating to national relationships specifically are the supremacy clause of Article VI, Section 2 and the Tenth Amendment. The supremacy clause has been all but the linchpin of the Constitution since it has the effect of binding the whole fabric of national government together. It prevents any state law which may pass in violation of the Constitution and even though the state law is not in violation of the Constitution and is not in violation of the national principle of delegated power, it is still subject to the national principle of delegated power. The Tenth Amendment states that the powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved to the states or to the people. In addition to these provisions merely making it clear that the Tenth Amendment prohibits the states in certain ways from dealing with the Nation. For example it has been held that some kinds

existence is inferred from the nature of the legislative function and the power to control the appellate jurisdiction of the Supreme Court (Article III Section 2). The upshot of this impressive array of authority—and the list could be extended substantially—is that the Congress is endowed with the full range of powers generally expected of a sovereign nation and that constitutionally speaking it stands forth as the dominant branch of the federal triumvirate.

2 *The Powers of the President* The Constitution makes the President an extremely potent executive. Article I Section 2 specifically makes him commander in chief of the nation's armed forces grants him broad control over the foreign policy of the United States through the treaty making power and authority over the administrative agencies of government through the power of appointment and removal. It is true that the Senate participates in both the treaty making and appointment process and that body is by no means negligible. But the President in the nature of the case holds the initiative and this means that he is usually the dominant partner with respect to these functions. The distinguishing characteristic of the president's constitutional authority is how ever its vagueness. His authority as commander in chief and his duty to take care that the laws be faithfully executed (Article II Section III) are both hard to define and some commentators have made much of them. More over it had been argued that the bestowal of the executive power vests him with general authority to perform the acts appropriate to that function quite apart from any explicit constitutional or congressional mandate. At all events it is clear that he is a very powerful figure. His position relative to the Congress probably depends not so much upon the Constitution as upon the facts of political life at any given time.

3 *The Judicial Power* The salient facts about the judicial power are two: the authority to review the acts and judicial decisions of the states which is supposedly derived from the supremacy clause and from the implications of Article III and the authority to review acts of



them as reasonably justified by some public danger. Amendments Four through Eight protect certain procedural rights of the individual—generally speaking the right to be free from arbitrary treatment by police officers and the right to a fair trial. Amendments Thirteen through Fifteen are the so-called Civil War Amendments passed after that conflict largely to ensure the newly freed Negro his civil rights. From the point of view of litigation the Fourteenth has been by far the most important. For some seventy years after its passage in 1868 the due process clause of that Amendment was interpreted chiefly as a protection for property holders but today it is construed to restrict the states in somewhat the same way that the first eight Amendments limit the national government.





# LETTER OF THE CONVENTION TO CONGRESS

*In Convention September 17 1787*

SIR

WE HAVE NOW THE HONOR to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable

The friends of our country have long seen and desired that the power of making war peace and treaties of levying money and regulating commerce and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union but the impropriety of delegating such extensive trust to one body of men is evident— Hence results the necessity of a different organization

It is obviously impracticable in the federal government of these States to secure all rights of independent sovereignty to each and yet provide for the interest and safety of all— Individuals entering into society must give up a share of liberty to preserve the rest The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved and on the present occasion this difficulty was increased by a difference among the several States as to their situation extent habits and particular interests

In all our deliberations on this subject we kept steadily in our view that which appears to us the greatest interest of every true American the consolidation of our Union in which is involved our prosperity felicity safety perhaps our national existence This important consideration seriously and deeply impressed on our minds led each State in the



# RESOLUTION OF THE CONVENTION

[September 1, 1787]

In Convention Monday September 1<sup>th</sup> 1787

**P**RESENT The States of New Hampshire Massachusetts  
Connecticut Mr Hamilton from New York New Jersey  
Pennsylvania Delaware Maryland Virginia North Carolina  
South Carolina and Georgia

Resolved That the Constitution be laid before the United States in Congress assembled and that it is the opinion of this convention that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof under the recommendation of its legislature for their assent and ratification and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved That it is the opinion of this convention that as soon as the conventions of nine States shall have ratified this Constitution the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same and a day on which the electors should assemble to vote for the President and the time and place for commencing proceedings under this Constitution that after such publication the electors should be appointed and the senators and representatives elected that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified signed sealed and directed as the Constitution requires to the secretary of the United States in Congress assembled that the senators and representatives should convene at the time and place as signed that the senators should appoint a president of the Senate for the sole purpose of receiving opening and counting the votes for President and that after he shall be

## THE BASIC DOCUMENTS

Convention to be less rigid on points of inferior magnitude than might have been otherwise expected and thus the Constitution which we now present is the result of a spirit of amity and of that of mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not perhaps to be expected but each will doubtless consider that had her interests alone been consulted the consequences might have been particularly disagreeable or injurious to others that it is liable to a few exceptions as could reasonably have been expected we hope and believe that it may promote the happiness of that country so dear to us all and secure her freedom and happiness is our most ardent wish.

With great respect

We have the honor to be

IR

Your Excellency's most

Obedient and Humble Servants

GEORGE WASHINGTON President

By Unanimous Order of the Convention

HIS EXCELLENCY

THE PRESIDENT OF CONGRESS

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[September 17 1787]

*In Convention Monday September 1<sup>th</sup> 1787*

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## THE BASIC DOCUMENTS

chosen the Congress together with the President  
without delay proceed to execute this Constitution  
*By the unanimous order of the convention*

GEORGE WASHINGTON *President*

WILLIAM JACKSON *Secretary*

# THE CONSTITUTION OF THE UNITED STATES

WE THE PEOPLE OF THE UNITED STATES IN ORDER TO FORM A MORE PERFECT UNION ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY PROVIDE FOR THE COMMON DEFENCE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA.

## ARTICLE I

**SECTION 1** All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives

**SECTION (1)** The House of Representatives shall be composed of Members chosen every second Year by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature

( ) No person shall be a Representative who shall not have attained to the Age of Twenty five years and been seven Years a Citizen of the United States and who shall not when elected be an inhabitant of that State in which he shall be chosen

(3) Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union according to their respective Numbers which shall be determined by adding to the whole Number of free Persons including those bound to Service for a Term of Years and excluding Indians not taxed three fifths of all other Persons The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States and within every subsequent Term of ten Years in such Man





(5) The Senate shall chuse their other Officers and also a President pro tempore in the Absence of the Vice President or when he shall exercise the Office of President of the United States

(6) The Senate shall have the sole Power to try all Impeachments When sitting for that Purpose they shall be on Oath or Affirmation When the President of the United States is tried the Chief Justice shall preside And no Person shall be convicted without the Concurrence of two thirds of the Members present.

(7) Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold and enjoy any Office of honor Trust or Profit under the United States but the Party convicted shall nevertheless be liable and subject to Indictment Trial Judgment and Punishment according to Law

SECTION 4 (1) The Times Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators

(2) The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December unless they shall by Law appoint a different Day

SECTION 5 (1) Each House shall be the Judge of the Elections Returns and Qualifications of its own Members and a Majority of each shall constitute a Quorum to do Business but a smaller Number may adjourn from day to day and may be authorized to compel the Attendance of absent Members in such Manner and under such Penalties as each House may provide

(2) Each House may determine the Rules of its Proceedings and punish its Members for disorderly Behavior and with the Concurrence of two thirds expel a Member

(3) Each House shall keep a Journal of its Proceedings and from time to time publish the same excepting such Parts as may in their Judgment require Secrecy and the Yeas and



the Votes of both Houses shall be determined by Yeas and Nays and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him the Same shall be a Law in like Manner as if he had signed it unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

(3) Every Order Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States and before the Same shall take Effect shall be approved by him or being disapproved by him shall be repassed by two thirds of the Senate and House of Representative according to the Rules and Limitation prescribed in the Case of a Bill.

SECTION 8 (1) The Congress shall have Power To lay and collect Taxes Duties Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States but all Duties Imposts and Excises shall be uniform throughout the United States

( ) To borrow money on the Credit of the United States  
 (3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes  
 (4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States

(5) To coin Money regulate the Value thereof and of foreign Coin and to fix the Standard of Weights and Measures  
 (6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States  
 (7) To establish Post Offices and post Roads

(8) To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries  
 (9) To constitute Tribunals inferior to the Supreme Court  
 (10) To define and Punish Piracies and Felonies committed



be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.

(3) No Bill of Attainder or ex post facto Law shall be passed.

(4) No Capitation or other direct tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.

(5) No Tax or Duty shall be laid on Articles exported from any State

(6) No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another nor shall Vessels bound to or from one State be obliged to enter clear or pay Duties in another

(7) No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law and a regular statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time

(8) No Title of Nobility shall be granted by the United States And no Person holding any Office of Profit or Trust under them shall without the Consent of the Congress accept of any present Emolument Office or Title of any kind whatever from any King Prince or foreign State

SECTION 10 (1) No State shall enter into any Treaty Alliance or Confederation grant Letters of Marque and Repression coin Money emit Bills of Credit make any Thing but gold and silver Coin a Tender in Payment of Debts pass any Bill of Attainder ex post facto Law or Law impairing the Obligation of Contracts or grant any Title of Nobility

(2) No State shall without the Consent of the Congress lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws and the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States and all such Laws shall be subject to the Revision and controul of the Congress

(3) No State shall without the Consent of Congress lay any Duty of Tonnage keep Troops or Ships of War in time of Peace enter into any Agreement or Compact with another



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one Vote A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States and a Majority of all the States shall be necessary to a Choice In every Case after the Choice of the President the person having the greatest Number of Votes of the Electors shall be the Vice President But if there should remain two or more who have equal votes the Senate shall chuse from them by Ballot the Vice President

(3) The Congress may determine the Time of chusing the Electors and the Day on which they shall give their Votes which Day shall be the same throughout the United States

(4) No Person except a natural born Citizen or a Citizen of the United States at the time of the Adoption of this Constitution shall be eligible to the Office of President neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years and been fourteen Years a Resident within the United States

(5) In Case of the Removal of the President from Office or of his Death Resignation or Inability to discharge the Powers and Duties of the said Office the same shall devolve on the Vice President and the Congress may by Law provide for the Case of Removal Death Resignation or Inability both of the President and Vice President declaring what Officer shall then act as President and such Officer shall act accordingly until the Disability be removed, or a President shall be elected

(6) The President shall at stated Times receive for his Service a Compensation which shall neither be increased nor diminished during the Period for which he shall have been elected and he shall not receive within that Period any other Emolument from the United States or any of them

(7) Before he enter on the Execution of his Office he shall take the following Oath or Affirmation — I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States and will to the best of my Ability preserve protect and defend the Constitution of the United States

SECTION 2 (1) The President shall be Commander in Chief



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(6) The President shall at stated Times receive for his Services a Compensation which shall neither be increased nor diminished during the Period for which he shall have been elected and he shall not receive within that Period any other Emolument from the United States or any of them.

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(1) The President shall be Commander in Chief



## ARTICLE III

SECTION 1 The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the supreme and inferior Courts shall hold their Offices during good Behaviour and shall at stated Times receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2 (1) The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution the Laws of the United States and Treaties made or which shall be made under their Authority—to all Cases affecting Ambassadors other public Ministers and Consuls—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a party—to Controversies between two or more States—between a State and Citizens of another State—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different State and between a State or the Citizens thereof and foreign States Citizens or subjects.

(2) In all Cases affecting Ambassadors other public Ministers and Consuls and those in which a State shall be a Party the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned the supreme Court shall have appellate Jurisdiction both as to Law and Fact with such Exceptions and under such Regulations as the Congress shall make.

(3) The Trial of all Crimes except in Cases of Impeachment shall be by Jury and such Trial shall be held in the State where the said Crimes shall have been committed but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3 (1) Treason against the United States shall consist only in levying War against them or in adhering to their Enemies giving them Aid and Comfort. No person shall be





any Claims of the United States or of any particular State  
 SECTION 4 The United States shall guarantee to every State  
 in this Union a Republican Form of Government and shall  
 protect each of them against Invasion and on Application of  
 the Legislature or of the Executive (when the Legislature  
 cannot be convened) against domestic Violence

## ARTICLE V

The Congress whenever two thirds of both Houses shall  
 deem it necessary shall propose Amendments to this Consti-  
 tution or on the Application of the Legislatures of two thirds  
 of the several States shall call a Convention for proposing  
 Amendments which in either Case shall be valid to all In-  
 tents and Purposes as Part of this Constitution when ratified  
 by the Legislatures of three fourths of the several States or  
 by Conventions in three fourths the eof as the one or the  
 other Mode of Ratification may be proposed by the Congress  
 Provided that no Amendment which may be made prior to  
 the Year One thousand eight hundred and eight shall in any  
 Manner affect the first and fourth Clauses in the Ninth Sec-  
 tion of the first Article and that no State without its Con-  
 sent shall be deprived of its equal Suffrage in the Senate

## ARTICLE VI

(1) All Debts contracted and Engagements entered into be-  
 fore the Adoption of this Constitution shall be as valid against  
 the United States under this Constitution as under the Con-  
 federation

(2) This Constitution and the Laws of the United States  
 which shall be made in pursuance thereof and all Treaties  
 made or which shall be made under the Authority of the  
 United States shall be the supreme Law of the Land and  
 the Judges in every State shall be bound thereby any Thing  
 in the Constitution or Laws of any State to the Contrary not-  
 withstanding



*Pennsylvania*

B FRANKLIN  
THOMAS MIFFLIN  
ROBT MORRIS  
GEO CLYMER

THOS FITZSIMONS  
JARED INGERSOLL  
JAMES WILSON  
GOUV MORRIS

*Delaware*

GEO READ  
GLYNN BEDFORD JUN  
JOHN DICKINSON

RICHARD BASSETT  
JACO BROOK

*Maryland*

JAMES MCHENRY  
DAN OF ST THOS JENIFER

DANL CARROLL

*Virginia*

JOHN BLAIR

JAMES MADISON JR

*North Carolina*

WM BLOUNT  
RICH DORRIS SPAIGHT

HU WILLIAMSON

*South Carolina*

J RUTLEDGE  
CHARLES COTESWORTH  
PINCKNEY

CHARLES PINCKNEY  
PIERCE BUTLER

*Georgia*

WILLIAM FEW  
Attest

ABR BALDWIN  
WILLIAM JACKSON *Secretary*



shall not be violated and no Warrants shall issue but upon probably cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized

## ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb nor shall be compelled in any Criminal Case to be a witness against himself nor be deprived of life liberty or property without due process of law nor shall private property be taken for public use without just compensation

## ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence

## ARTICLE VII

In Suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law



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## THE BASIC DOCUMENTS

## ARTICLE VIII

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted

## ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

## ARTICLE X

The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people

## LATER AMENDMENTS

## ARTICLE XI

[January 8 1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State

## ARTICLE XII

[September 25 1801]

The Electors shall meet in their respective states and vote by ballot for President and Vice President one of whom at

least shall not be an inhabitant of the same state with themselves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the President of the Senate —The President of the Senate shall in presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted —The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of Electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President the House of Representatives shall choose immediately by ballot, the President But in choosing the President the votes shall be taken by states the representation from each state having one vote a quorum for this purpose shall consist of a member or members from two thirds of the states and a majority of all the states shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following then the Vice President shall act as President as in the case of the death or other constitutional disability of the President The person having the greatest number of votes as Vice President shall be the Vice President if such number be a majority of the whole number of Electors appointed and if no person have a majority then from the two highest numbers on the list the Senate shall choose the Vice President a quorum for the purpose shall consist of two thirds of the whole number of Senators and a majority of the whole number shall be necessary to a choice But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States

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in Congress or elector of President and Vice President or hold any office civil or military under the United States or under any State, who having previously taken an oath as a member of Congress or as an officer of the United States or as a member of any State legislature or as an executive or judicial officer of any State to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each House remove such disability

Section 4 The validity of the public debt of the United States authorized by law including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave but all such debts obligations and claims shall be held illegal and void

Section 5 The Congress shall have power to enforce by appropriate legislation the provisions of this article

## ARTICLE XV

[Mar 1 30 1870]

Section 1 The right of citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of race color or previous condition of servitude

Section The Congress shall have power to enforce this article by appropriate legislation

## ARTICLE XVI

[February 25 1913]

The Congress shall have the power to lay and collect taxes on incomes from whatever source derived without apportionment



in Congress, or elector of President and Vice President or hold any office civil or military under the United States or under any State who having previously taken an oath as a member of Congress or as an officer of the United States or as a member of any State legislature or as an executive or judicial officer of any State to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each House remove such disability

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[March 30 1870]

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[February 25 1913]

The Congress shall have the power to lay and collect taxes on incomes from whatever source derived without apportionment





the legislatures of the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress.

## ARTICLE XIX

[August 26 1920]

Section 1 The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2 Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XX

[February 6 1933]

Section 1 The terms of the President and Vice President shall end at noon on the twentieth day of January and the terms of Senators and Representatives at noon on the third day of January of the years in which such terms would have ended if this article had not been ratified and the terms of their successors shall then begin.

Section 2 The Congress shall assemble at least once in every year and such meeting shall begin at noon on the third day of January unless they shall by law appoint a different day.

Section 3 If at the time fixed for the beginning of the term of the President the President elect shall have died the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term or if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified and the Congress may by law provide for the case where neither a President elect nor a Vice President elect shall have qualified declaring who shall then act as President or the manner in which one who



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office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President or acting as President during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three fourths of the several States within seven years from the date of its submission to the States by the Congress.

## THE BASIC DOCUMENTS

is to act shall be selected and such person shall act record  
ingly until a President or Vice President shall have qualified.

Section 4 The Congress may by law provide for the case  
of the death of any of the persons from whom the House of  
Representatives may choose a President whenever the right of  
choice shall have devolved upon them and for the case of the  
death of any of the persons from whom the Senate may choose  
a Vice President whenever the right of choice shall have de-  
volved upon them

Section 5 Sections 1 and 2 shall take effect on the fifteenth  
day of October following the ratification of this article

Section 6 This article shall be inoperative unless it shall  
have been ratified as an amendment to the Constitution by  
the legislatures of three fourth of the several States within  
seven years from the date of its submission

## ARTICLE XXI

[December 5, 1919]

Section 1 The eighteenth article of amendment to the  
Constitution of the United States is hereby repealed

Section 2 The transportation or importation into any  
State Territory or possession of the United States for deliv-  
ery or use therein of intoxicating liquors in violation of the  
laws thereof is hereby prohibited

Section 3 This article shall be inoperative unless it shall  
have been ratified as an amendment to the Constitution by  
conventions in the several States called in the Consti-  
tution within seven years from the date of the submission  
hereof to the States by the Congress

## ARTICLE XXII

[March 1, 1951]

Section 1 No person shall be elected to the office of the  
President more than twice and no person who has held the

